SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 54

UNITED STATES OF AMERICA, APPELLANT,

vs.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDEX

1 IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil No. 21743

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC., *Defendants*.

Complaint—Filed December 4, 1956

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of that Act.

2. Each of the defendants transacts business and is found within the Eastern District of Pennsylvania.

2 II

DEFINITION OF TERMS

3. As used herein:

(a) "Affiliate" means a television or radio station affiliated with a national television or radio broadcasting network.

(b) "Network time" means advertising time purchased on national networks of television or radio stations by national advertisers.

(c) "National spot advertising" means advertising time purchased on television or radio stations by national advertisers for broadcast during non-network time.

(d) "Local advertising" means advertising time purchased on television or radio stations by regional and local advertisers for broadcast during non-network time.

(e) "The eight primary markets" means the eight largest United States metropolitan areas in terms of both population and retail sales; namely, in order of size, New York City, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco, and Pittsburgh.

(f) "Major market" means one of the fifty largest United States metropolitan areas in terms of both population and retail sales.

(g) "Station group" means a group of television and radio stations, under common ownership or control, which are located in and serve different major markets.

III

Defendants

4. Radio Corporation of America (herein referred to as RCA) is hereby made a defendant. RCA is a corporation organized and existing under the laws of the
3 State of Delaware. It is engaged in the manufacture, sale and distribution of a full line of the products, parts and accessories used in the transmission and reception of television and radio signals. RCA has total annual revenues of about $1,000,000,000.

5. National Broadcasting Company, Inc. (herein referred to as NBC) is hereby made a defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a wholly-owned subsidiary of defendant, RCA, and is engaged in the business, among other things, of producing, selling and distributing television and radio programs and advertising. NBC furnishes network service to about 200 independent television stations and about 200 independent AM radio stations (and many companion FM radio stations), as well as to the members of its owned and operated station group. The NBC station group consists of five very high frequency (herein referred to as VHF) television broadcasting stations, five standard amplitude modulation (herein referred to as AM) radio broad-

casting stations, and four frequency modulation (herein referred to as FM) radio broadcasting stations. These stations are located in New York City, Chicago, Los Angeles, Philadelphia, San Francisco, and Washington, D. C. NBC has also acquired two ultra high frequency (herein referred to as UHF) television broadcasting stations in Buffalo, New York and New Britain, Connecticut. NBC acts as advertising sales representative for all members of its station group, as well as for some independently owned stations. Total revenues of NBC, including revenues from television and radio broadcasting, account for over 23% of RCA's total annual revenues.

IV

The Trade and Commerce Involved

6. The sale of advertising is essential to the operation of television and radio networks, station groups and broadcasting stations. Broadcast advertising is conveyed
4 from the networks across state lines to television and radio stations throughout the United States, and is broadcast by television and radio stations across state lines to viewers and listeners throughout the United States.

7. Vigorous competition for national spot advertising and local advertising exists among networks, network station groups, independent station groups and independent stations. There is also competition among the networks, and between the networks and independent representatives, for representation of independent stations and station groups in the sale of national spot advertising.

8. Broadcast advertising requires and results in a continuous stream of commercial intercourse across state lines, including the collection and payment of fees for the sale of broadcast time, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

9. Television networks originate network programming and advertising which they supply to broadcasting stations owned and operated by them and, pusuant to affiliation contracts, to broadcasting stations owned and operated by others. About 95% of all television stations in the United

States are affiliated with one or more networks. Affiliation makes television station operations more profitable and is generally essential to the economic survival of television stations except in the three largest major markets. Time periods adjacent to popular network programs are particularly attractive to advertisers for local and national spot advertising. Station breaks, during which the broadcasting station is identified at regular intervals, provide valuable advertising for the station owner.

10. There are three national television networks: NBC, Columbia Broadcasting System (herein referred to as CBS), and American Broadcasting Company (herein referred to as ABC), each with about 200 affiliates. In 1954 the television broadcasting revenues of NBC and its owned stations were approximately $120,000,000, of CBS and its owned stations approximately $123,000,000, and of ABC and its owned stations approximately $44,000,000. In 1955 these revenues were approximately: NBC—$159,000,000, CBS—$153,000,000 and ABC—$54,000,000.

11. Television and radio stations are instrumentalities through which programs and advertisements are broadcast or transmitted across state lines to viewers and listeners in the respective market areas of such stations. In 1954 the total revenue from the sale of broadcasting time on all United States television stations was approximately $538,122,000. Of such revenue, network time sales accounted for approximately $241,225,000 (45%), national spot advertising for approximately $176,766,000 (33%) and local advertising for approximately $120,131,000 (22%).

12. Products, parts and accessories used in the transmission and reception of television and radio signals are manufactured in many states of the United States and are sold and shipped by the manufacturers thereof, including RCA and Westinghouse Electric Corporation (herein referred to as Westinghouse Electric) in interstate commerce to wholesalers, retailers and other purchasers located in various states of the United States.

13. Philadelphia is the fourth market in the United States in terms of both population and retail sales. In

this market, there are three VHF television stations: WRCV-TV (formerly WPTZ), owned and operated by and affiliated with NBC; WCAU-TV, owned by WCAU, Inc. and affiliated with CBS; and WFIL-TV, owned by Triangle Publications, Inc. and affiliated with ABC. RCA-Victor, the RCA manufacturing division, has its headquarters in Camden, New Jersey, and some of its largest plants are in the Philadelphia market area. Westinghouse Electric also has large plants in that area. Large
6 quantities of the products, parts and accessories described in paragraph 12 of this complaint are produced by manufacturers, including RCA and Westinghouse Electric, in the Philadelphia market area, and from there are shipped to and sold in states of the United States other than the state of their manufacture.

14. Cleveland is the tenth market in the United States in terms of both population and retail sales.

V

Background of the Offenses Charged

15. In February 1954, the defendant NBC owned and operated the following VHF television stations:

WRCA-TV	New York	(market 1)
WNBQ	Chicago	(market 2)
KRCA	Los Angeles	(market 3)
WNBK	Cleveland	(market 10)
WRC-TV	Washington, D. C.	(market 11)

16. In August 1954, Westinghouse Broadcasting Co., Inc. (herein referred to as WBC), a wholly-owned subsidiary of Westinghouse Electric, owned and operated the following VHF television stations:

WPTZ	Philadelphia	(market 4)	NBC Affiliate
WBZ-TV	Boston	(market 6)	NBC Affiliate
KPIX	San Francisco	(market 7)	CBS Affiliate

WBC also was an applicant for VHF stations in Pittsburgh (market 8) and Portland, Oregon (market 20). WBC was the only non-network station owner with three VHF stations in markets 4 through 7. In this capacity, it

was an important competitor of defendant NBC and other station owners for advertising in the eight primary markets.

17. Prior to December 1954, Allen B. DuMont Laboratories, Inc. owned and operated WDTV, the only VHF station in Pittsburgh, Pennsylvania (market 8), which station carried some programs of each of the networks CBS, ABC and the defendant NBC. On or about December 3, 1954, DuMont sold this station to WBC.

7

VI

Offenses Charged

18. Beginning about March 1954, and continuously thereafter to the date of the filing of this complaint, the defendants RCA and NBC have been engaged in an unlawful combination or conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

19. The aforesaid combination or conspiracy has consisted of a continuing agreement and concert of action between the defendants RCA and NBC to obtain VHF television station ownership for NBC in five of the eight primary markets by the unlawful use of the power of the defendant, NBC, as a network, to grant to or withhold from non-network station owners, NBC network affiliation for their television stations.

20. Defendants RCA and NBC have effectuated this combination or conspiracy in part by depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market by the following means:

(a) Threatening to cancel or to refuse to renew WBC's affiliation with NBC in Boston and Philadelphia if WBC refused to negotiate with NBC for the transfer of its VHF station in Philadelphia to NBC;

(b) Withholding affiliation with NBC for a VHF station about to be acquired by WBC in Pittsburgh, until WBC agreed to transfer its VHF station in Philadelphia to the defendant NBC;

(c) Threatening to withhold affiliation with NBC for WBC's fifth VHF and two UHF stations when acquired.

8 21. On or about May 16, 1955, defendant NBC entered into a contract with WBC in unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act. This contract provided that:

(a) NBC would acquire the WBC television and radio broadcasting facilities in Philadelphia;

(b) WBC would acquire the NBC television and radio broadcasting facilities in Cleveland;

(c) NBC would pay WBC $3,000,000.

On or about January 21, 1956, WBC and the defendant NBC exchanged the aforesaid facilities pursuant to this contract.

22. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

23. The effects of the aforesaid offenses, among others, have been and are:

(a) To reduce the ability of WBC as a station owner to compete with NBC and other station owners for the sale of advertising;

(b) To preclude competition among independent advertising representatives for representation of one of the VHF stations in the Philadelphia market;

(c) To preclude competition among station owners in the Philadelphia market for NBC network affiliation; and

(d) To reduce the ability of Westinghouse Electric to compete with RCA and others in the sale of equipment for the transmission and reception of radio and television signals.

9 PRAYER

WHEREFORE, plaintiff prays:

1. That the aforesaid combination or conspiracy and the aforesaid contract of May 16, 1955 be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That pursuant to the authority granted it by Section 4 of the Sherman Act, and by Section 313 of the Communications Act of 1934, as amended (47 U.S.C. § 313), the Court order such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate.

3. That the plaintiff have such other and additional relief as may be proper.

4. That the plaintiff recover the costs of this suit.

/s/ BERNARD M. HOLLANDER
/s/ RAYMOND M. CARLSON
Attorneys, Department of Justice

/s/ HERBERT BROWNELL, JR.

/s/ VICTOR R. HANSEN
Assistant Attorney General

/s/ VICTOR H. KRAMER
Attorney, Department of Justice

/s/ W. WILSON WHITE
United States Attorney

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10 IN UNITED STATES DISTRICT COURT

Interrogatories Propounded by Defendants (Excerpts from)

* * * * * * * * * *

14. With respect to the allegations of paragraph 18 of the complaint that "RCA and NBC have been engaged in an unlawful combination or conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce", define precisely what trade or commerce plaintiff claims was restrained or sought to be restrained by defendants,

stating the geographical boundaries of the market area or areas involved, and stating as to each such area:

(a) The products or services involved; if advertising is included, state the type of advertising and the class and location of advertisers involved.

11 (b) The names and addresses of each person whose trade in such products or services plaintiff claims was restrained or sought to be restrained by defendants, stating as to each such person:

(1) The products or services involved.

(2) The nature and extent of the restraint plaintiff claims was imposed or sought to be imposed.

(3) The time when, place where, and manner in which plaintiff claims said restraint was imposed or sought to be imposed by defendants.

15. With respect to the allegations of paragraphs 18 and 19 of the complaint that RCA and NBC have been engaged in an unlawful combination or conspiracy, state:

(a) When and where the alleged combination or conspiracy was entered into.

(b) The names and addresses of all persons alleged to have participated in the original combination or conspiracy on behalf of NBC.

(c) The names and addresses of all persons alleged to have participated in the original combination or conspiracy on behalf of RCA.

(d) Whether there were at any time any other participants in the alleged combination or conspiracy; if so, state as to each person:

12 (1) His name and address.

(2) The time when and place where he joined or first participated in the conspiracy.

(3) The name and address of the person or organization he represented, if any.

(4) Whether he joined the conspiracy orally or in writing; if orally, describe the conversation; if in writing, describe and state the location of the document or documents.

(5) His part in the conspiracy; including any acts he performed in furtherance thereof.

(6) All other facts of which plaintiff has knowledge to support its claim that he participated in the alleged combination or conspiracy.

(e) Whether plaintiff claims that there was an express combination or conspiracy or continuing agreement between RCA and NBC; if so, state all facts of which plaintiff has knowledge to support its claim.

(f) Whether the original combination or conspiracy or continuing agreement was in writing or oral; if in writing, describe and state the location of the document or documents; if oral, describe the conversation, stating what was said and done by each person and on whose behalf it was said and done.

(g) The specific part or parts of such agreement which plaintiff claims to have been in unreasonable restraint of trade, quoting each verbatim.

13 (h) Whether plaintiff claims that the terms of the original combination or conspiracy were ever modified; if so, describe each such modification and the circumstances under which it occurred, and state the time when and place where it occurred.

(i) Whether plaintiff claims that the alleged combination or conspiracy or continuing agreement is to be inferred from the course of conduct of RCA and NBC; if so, state each course of conduct of RCA and NBC (answering separately for each) on which plaintiff relies in making that claim, and state all facts of which plaintiff has knowledge with respect to each such course of conduct.

(j) Each instance of which plaintiff has knowledge to support its claim that there was a "concert of action" between RCA and NBC as alleged in paragraph 19 of the complaint, stating as to each such instance:

(1) Precisely what the "concert of action" consisted in.

(2) Whether plaintiff claims the alleged concert of action was the result of an express or implied agreement between RCA and NBC, and state all facts of which plaintiff has knowledge to support either claim.

(3) Each act or discussion relating to such concert of action, stating:

(i) The time when and place where it occurred.

(ii) The name of each individual present, and the name of the organization each represented.

14 (iii) What was said and done by each individual on that occasion.

(iv) The manner in which plaintiff claims this event contributed to the alleged concert of action.

(4) The manner in which plaintiff claims the alleged concert of action aided the alleged conspiracy.

(k) Each act plaintiff claims was performed (i) by RCA or on its behalf, and (ii) by NBC or on its behalf (answering separately for each) pursuant to or in furtherance of the alleged combination or conspiracy, stating as to each such act:

(1) The person or persons who performed such act, and on whose behalf each acted.

(2) The time when and place where such action was performed.

(3) The other persons present, and the organization or person, if any, which each represented.

(4) The substance of what was said and done by each person.

(5) The manner in which said action aided the alleged combination or conspiracy.

(l) Whether plaintiff claims that the acts allegedly performed by NBC at paragraphs 20 and 21 of the complaint (i) were unlawful because of the alleged combination or conspiracy, or (ii) would have been unlawful even if there

had been no combination or conspiracy, or both, and state the basis for such claim.

15 (m) Whether plaintiff claims that the alleged combination or conspiracy still continues; if so, state all facts of which plaintiff has knowledge to support its claim; if not, state the date of termination.

16. With respect to the allegations of paragraph 19 of the complaint that "The aforesaid combination or conspiracy has consisted of a continuing agreement and concert of action between the defendants RCA and NBC to obtain VHF television station ownership for NBC in five of the eight primary markets by the unlawful use of the power of the defendant NBC, as a network, to grant to or withhold from non-network station owners, NBC network affiliation for their television stations", state:

(a) Whether plaintiff claims that the object of the alleged combination or conspiracy was to obtain specific VHF stations; if so, state the call letters and location of each such station.

(b) Whether plaintiff claims that the object of the alleged combination or conspiracy was to obtain VHF station ownership for NBC in a specific five of the eight primary markets; if so, state which five.

(c) Whether plaintiff claims that the object of the alleged combination or conspiracy (to obtain VHF stations in five of the eight primary markets) was an unlawful one, or that the means allegedly used to obtain that object (the alleged use of NBC's power to grant or withhold NBC network affiliation) was unlawful, or both.

16 (d) If the answer to any part of the preceding interrogatory 16(c) is in the affirmative, state in what respect and on what basis plaintiff claims such conduct was unlawful.

(e) Whether, by NBC's "power to grant or withhold" NBC network affiliation, plaintiff refers to NBC's right to enter or not to enter affiliation contracts with stations by mutual agreement; if not, to what does plaintiff refer.

(f) Whether plaintiff claims that NBC does not have the right "to grant to or withhold from station owners

NBC network affiliation"; if so, state the basis for this claim.

(g) Whether plaintiff claims that NBC's "power to grant or withhold" network affiliation was or is different in any respect from the "power" which other networks have over their own affiliations; if so, state the manner and respect in which plaintiff claims it was or is different.

(h) Whether plaintiff claims that NBC obtained this "power to grant or withhold" network affiliation in an unlawful manner; if so, in what respect and on what basis does plaintiff claim the obtaining of such power was unlawful.

(i) Whether plaintiff claims that NBC possessed an unlawful advantage over others by reason of NBC's "power to grant or withhold" NBC network affiliation; if so, what others and in what respects does plaintiff claim NBC possessed such unlawful advantage.

(j) The names and addresses of the "non-network station owners" to whom plaintiff refers.

17 (k) Whether plaintiff claims that anything in addition to the acts alleged in paragraphs 20 and 21 of the complaint was done pursuant to or in furtherance of the alleged conspiracy; if so, state as to each such act precisely what plaintiff claims was said or done, by whom, on whose behalf, to whom (stating the name and business affiliation of each person present), at what time and place, and the manner in which plaintiff claims that the said act aided the conspiracy.

17. With respect to the allegations of paragraph 20 of the complaint, that RCA and NBC have effectuated the alleged combination or conspiracy "by depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market" by means of certain alleged threats and acts, state:

(a) Precisely what plaintiff contends was RCA's part in depriving WBC and Westinghouse Electric of WBC's VHF station in Philadelphia, stating with respect to each act allegedly performed by RCA or on its behalf:

(1) The individual or individuals who so acted.

(2) The time and place.

(3) The names of any other persons present, and the name of the person or organization each represented, if any.

(4) What was said and done.

(5) All other facts of which plaintiff has knowledge concerning such act.

18 (b) Whether plaintiff contends that Westinghouse Electric had any interest in WBC's VHF station in Philadelphia, apart from the fact that Westinghouse Electric is the parent company of WBC; if so, state what plaintiff claims was the nature and extent of this interest.

(c) Whether the alleged deprivation to which plaintiff refers consisted in the Philadelphia-Cleveland exchange agreement between NBC and WBC as alleged in paragraph 21 of the complaint; if not, what does plaintiff mean by "depriving".

(d) Whether plaintiff claims that WBC entered the exchange agreement alleged in paragraph 21 of the complaint solely because of the threats and acts alleged in paragraph 20; if not, state precisely what plaintiff claims was the connection between these alleged threats and acts and the exchange agreement.

(e) Whether plaintiff claims that any of the threats or acts alleged were in violation of any contract or agreement; if so, state as to each such agreement:

(1) The date thereof.

(2) The parties, and the names of all persons who acted on behalf of each party.

(3) Whether such agreement was made orally or in writing; if orally, state the substance thereof; if in writing, describe and state the location of the document or documents.

(4) The period during which such agreement was in effect.

19 (5) Which of the threats or acts alleged were in violation of this agreement.

(f) Whether plaintiff claims that WBC had a right to the renewal of the NBC affiliations referred to in paragraph 20(a), or to the granting of the NBC affiliations referred to in paragraph 20(b) and (c); if so, state the basis for and term of each such right and all other facts of which plaintiff has knowledge concerning it.

(g) Whether plaintiff claims that NBC was under an obligation to renew its affiliation with the WBC stations referred to in paragraph 20(a), or to affiliate with the stations referred to in paragraph 20(b) and (c); if so, state the basis for and term of each such obligation and all other facts of which plaintiff has knowledge concerning it.

(h) Whether plaintiff claims that affiliation with the NBC network was and is "essential to the economic survival" of any of the stations referred to in paragraph 20 of the complaint; if so, identify each station as to which this claim is made, and state as to each:

(1) The respect in which and extent to which plaintiff claims that NBC affiliation was essential to the economic survival of that sation.

(2) The period of time during which plaintiff claims that NBC affiliation was essential to the economic survival of that station.

20 (3) All other facts of which plaintiff has knowledge to support its claim.

(i) Whether plaintiff claims that any of the threats or acts alleged constituted a violation of any rule, regulation or policy of the Federal Communications Commission or of any provision of the Communications Act of 1934; if so, identify the threat or act and state the statutory provision or FCC rule, regulation or policy which plaintiff claims was violated thereby.

(j) The earliest date at which plaintiff claims that there was a definite or enforceable agreement for the transfer of WBC's Philadelphia station to NBC, stating as to that agreement:

(1) The price and all of the other terms and conditions.

(2) The parties to it, and the names of all persons who acted on behalf of each party.

(3) Whether the agreement was made orally or in writing; if orally, state the substance of the conversation; if in writing, describe and state the location of the document or documents.

(4) Whether that agreement was ever modified; if so, state the date and substance of each such modification.

* * * * * * * * * *

21 24. With respect to the allegations of paragraph 22 of the complaint that "Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted":

(a) Identifying each of the "said offenses" to which plaintiff refers, and state the respect in which and basis on which plaintiff claims such conduct was illegal.

(b) State all facts of which plaintiff has knowledge to support its claim that these offenses are (i) continuing and (ii) will continue to exist.

(c) Specify what relief plaintiff claims is necessary and indispensable in order to insure that these offenses will cease.

(d) State whether plaintiff seeks to nullify the order of the FCC approving the exchange; if not, in what respect or respects does plaintiff claim such order should remain in effect.

(e) Specify what, if anything, plaintiff seeks to have done with respect to the Philadelphia and Cleveland television and radio facilities, and on what terms and conditions, if any.

22 25. With respect to the allegations of paragraph 23 of the complaint concerning the effects of certain alleged offenses, state:

(a) Whether "the aforesaid offenses" to which plaintiff refers are the same as those described in answer to interrogatory 24 (a); if not, state the offenses to which plaintiff

here refers and the basis for plaintiff's claim that such conduct was illegal.

(b) What other effects plaintiff refers to in its statement that the effects of the alleged offenses "among others" are as stated in paragraph 23 of the complaint.

(c) Whether plaintiff claims that any of the effects alleged or identified in answer to interrogatory 25 (b) are illegal; if so, state each effect as to which such claim is made, and specify with respect to each:

(1) Whether plaintiff claims it is illegal per se; if so, in what respect and on what basis.

(2) The additional facts, if any, which plaintiff claims render such effect illegal, and state in what respect and on what basis plaintiff claims these facts render the effect illegal.

(d) Whether plaintiff claims that NBC's primary purpose in entering into the exchange transaction was to bring about any or all of the effects alleged or identified in answer to interrogatory 25 (b); if so, specify the
23 effect or effects as to which such claim is made, and state all facts of which plaintiff has knowledge to support each such claim.

(e) Whether plaintiff claims that the effects alleged or identified in answer to interrogatory 25 (b) were the natural and necessary result of the exchange transaction; if not, state how plaintiff claims the exchange could have been effected to avoid such results.

* * * * * * * * * *

24 27. With respect to the effects alleged in paragraph 23 (b) and (c) of the complaint, state whether plaintiff contends that these effects are present in any market where a network owns and operates a television station, if not, state the facts which plaintiff claims distinguish the Philadelphia market from others in this respect, and all other facts of which plaintiff has knowledge to support this claim.

* * * * * * * * * *

25 31. With respect to paragraph 2 of the prayer for relief in the complaint, state:

26 (a) Whether plaintiff claims that the divestiture of any assets of NBC is necessary and indispensable in order to remedy the offenses alleged.

(b) If the answer to the preceding interrogatory is in the affirmative, describe and state the location of such asset or assets, and state in each case why plaintiff claims such divestiture is necessary.

(File Endorsement Omitted)

27 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted)

Notice of Motion—Filed March 6, 1957

To: Bernard G. Segal, Esquire
1719 Packard Building
Philadelphia 2, Pennsylvania
Attorney for Defendants

Schnader, Harrison, Segal & Lewis
1719 Packard Building
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Of Counsel

PLEASE TAKE NOTICE, that the undersigned will bring the attached motion on for hearing before this Court at the United States Court House, Philadelphia, Pennsylvania, on a date to be hereafter fixed by the Court, of which you will be notified.

/s/ BERNARD M. HOLLANDER

/s/ RAYMOND M. CARLSON

Attorneys,
U. S. Department of Justice
Washington 25, D. C.

28 **Motion for Production of Documents Under Rule 34—Filed March 6, 1957**

The plaintiff moves this Court under Rule 34 of the Federal Rules of Civil Procedure, for an order requiring the defendants to produce, by delivery to the Antitrust Division of the Department of Justice, 10th Street and Pennsylvania Avenue, N.W., Washington, D. C., and to permit the plaintiff to inspect and to copy or photograph each of the following documents:

A. With respect to defendant National Broadcasting Company (herein called NBC):

1. All documents of which numbered copies 1 through 402 have heretofore been delivered to the Antitrust Division of the Department of Justice by NBC and/or Radio Corporation of America (herein called RCA) in response to grand jury subpoenas *duces tecum* served upon them on July 26, 1956.

2. A memorandum of about 30 pages written in 1953 or early 1954 by Charles R. Denny, possibly in conjunction with Ted Cott, both then Vice Presidents of defendant NBC, to David Sarnoff, Chairman of the Boards of RCA and NBC, or to Frank White, then President of NBC, which dealt with the status of NBC's Owned and Operated Stations Division, and compared the markets in which NBC's stations were located with markets in which stations were owned and operated by the American Broadcasting Company and the Columbia Broadcasting System.

29 3. All memoranda, other than that described in 2 above, or graphic presentations, prepared or received by NBC or RCA officials or employees between January 1, 1946 and the present, which deal with the status of NBC's Owned and Operated Stations Division, and compare the markets in which NBC's stations were or are located with those markets served by stations owned and operated by the American Broadcasting Company and/or Columbia Broadcasting System.

4. The NBC Semi-annual Rate Review Report for January-June 1956, prepared by Hugh M. Beville, Jr., Vice President of NBC.

5. All documents and other writings or recordings of every kind, not heretofore described in 1 above, which are in the possession or control of NBC, its officers, directors, agents, representatives or employees, and which were prepared, sent or received by NBC or its employees, which refer or relate to:

(a) The possible acquisition or negotiations for acquisition by NBC of any NBC affiliated VHF television station, during the period May 18, 1951 to the date of service of this motion;

(b) RCA's or NBC's reasons for establishing the letters RC or RCA as part of the station call letters of NBC's Owned and Operated Stations during the period January 1, 1923 to the date of service of this motion;

(c) NBC's willingness to sell advertising time on the NBC Owned Stations, whether television or radio, as a group, and/or NBC's methods for charging advertisers for such purchases, during the period January 1, 1947 to the date of service of this motion;

(d) The decision by Westinghouse Broadcasting Company to terminate its national spot sales representation agreement with the NBC Spot Sales Division for its radio stations, on or about January 1, 1949, and its decision to terminate such representation by
30 the NBC Spot Sales Division of its television stations in 1953 or 1954, during the period January 1, 1948 to the date of service of this motion;

(e) The present affiliation status of the Westinghouse Broadcasting Company's television stations with NBC;

(f) The advantages to RCA in the sale of its consumer products, including color television receivers, of NBC's ownership and operation of a station in Philadelphia, during the period January 1, 1945 to the date of service of this motion;

6. All documents and other writings or recordings of every kind, not heretofore described in 1 above, which are in the possession or control of NBC, its officers, directors,

agents, representatives or employees, and which were prepared, sent or received by NBC or its employees, which contain or reflect:

(a) The broadcasting time devoted by (1) NBC owned television stations and (2) NBC affiliated (other than NBC owned) television stations, to NBC black and white television network programs and NBC color television network programs, during the period January 1, 1953 to the date of service of this motion, and all comparisons of such data during said period;

(b) The broadcasting time devoted by television station WPTZ, Philadelphia, during its ownership by Westinghouse Broadcasting Company:

(1) To carrying NBC color television network programs in color and black and white;

(2) To carrying NBC network color television programs in black and white only;

(3) To carrying NBC black and white television network programs;

(4) To originating its own television programs in black and white; and

(5) To originating its own television programs in color;

(c) The broadcasting time devoted by television station WRCV-TV, Philadelphia, during its ownership by NBC, as broken down for WPTZ in subparagraphs (1)-(5) of (b) above;

(d) Comparisons of the matters described in (b) above with the matters described in (c) above;

(e) Predictions, prognostications or estimates, during the period January 1, 1954 to the date of service of this motion, comparing the broadcasting schedule of WPTZ with any planned or hypothetical broadcasting schedule of a proposed or owned NBC television station in Philadelphia, with respect to origin of the programs (network or local) or nature of the television signal (black and white or color).

B. With respect to defendant Radio Corporation of America:

All documents and other writings or recordings of every kind, which are in the possession or control of RCA, its officers, directors, agents, representatives or employees, and which were prepared, sent or received by RCA or its employees, hereinbefore described as to NBC in A 1-6 above.

Defendants NBC and RCA are believed to have possession, custody or control of each of the foregoing documents. There is reason to believe that said documents constitute or contain evidence, or relate to matters, relevant and material to the issues involved in this action, as is more fully shown in the attached affidavit of Bernard M. Hollander.

/s/ Bernard M. Hollander

/s/ Raymond M. Carlson

Attorneys,
U. S. Department of Justice
Washington 25, D. C.

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32 **Affidavit in Support of Motion for Production of Documents Under Rule 34**

District of Columbia ss:

Bernard M. Hollander, being first duly sworn, deposes and says:

1. He is an attorney in the Antitrust Division, Department of Justice, duly authorized to represent the plaintiff in this action, and that he has been in charge, since its inception, of the investigation which resulted in the filing of this action.

2. He believes that the documents described in paragraph 1 of plaintiff's Motion for Production of Documents Under Rule 34 are in the possession, custody and control of the defendants or their counsel, because copies of all of these documents were produced and delivered to plaintiff in compliance with grand jury subpoenas *duces tecum* served upon defendants on July 26, 1956.

3. As to the remaining documents described in plaintiff's motion, your deponent believes that such documents are in the possession, custody or control of the defendants, because each of the requests pertain to some activity participated in by either one or both of the defendant corporations, or to business records kept by such corporations.

33 4. As a result of his familiarity with the investigation which led to this action, and upon the basis of documents now in possession of the Department of Justice, your deponent believes that the documents described in the attached motion are relevant or contain relevant information needed by the Government properly to prepare for trial and, fully and accurately, to define the issues.

BERNARD M. HOLLANDER
Bernard M. Hollander

Subscribed and sworn to before me
this 5th day of March, 1957.

SARA B. MCGRANN
Notary Public

My Commission expires May 1, 1961.

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34 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Defendants*.

Unsigned and Undated Order Directing Defendants to Produce and to Permit Inspection, Copying or Photograph Documents

Plaintiff having filed a motion under Rule 34 of the Federal Rules of Civil Procedure for an order directing the defendants Radio Corporation of America (herein called RCA) and National Broadcasting Company (herein called NBC), to produce, and to permit inspection, copying

or photographing of the documents described in the motion, service thereof having been made upon and accepted by these defendants, and good cause appearing,

It Is Hereby Ordered that the defendants RCA and NBC produce to the plaintiff, for inspection, and copying or photographing, the following documents:

1. All documents of which numbered copies 1 through 402 have heretofore been delivered to the Antitrust Division of the Department of Justice by RCA and/or NBC in response to grand jury subpoenas *duces tecum* served upon them on July 26, 1956.

2. A memorandum of about 30 pages written in 1953 or early 1954 by Charles R. Denny, possibly in conjunction with Ted Cott, both then Vice Presidents of defendant NBC, to David Sarnoff, Chairman of the Boards of RCA and NBC, or to Frank White, then President of NBC, which dealt with the status of NBC's Owned and Operated Stations Division, and compared the markets in which NBC's stations were located with markets in which
35 stations were owned and operated by the American Broadcasting Company and the Columbia Broadcasting System.

3. All memoranda, other than that described in 2 above, or graphic presentations, prepared or received by RCA or NBC officials or employees between January 1, 1946 and the present, which deal with the status of NBC's Owned and Operated Stations Division, and compare the markets in which NBC's stations were or are located with those markets served by stations owned and operated by the American Broadcasting Company and/or Columbia Broadcasting System.

4. The NBC Semi-annual Rate Review Report for January-June 1956, prepared by Hugh M. Beville, Jr., Vice President of NBC.

5. All documents and other writings or recordings of every kind, not heretofore described in 1 above, which are in the possession or control of RCA or NBC, their officers, directors, agents, representatives or employees, and which were prepared, sent or received by RCA or NBC or their employees, which refer or relate to:

(a) The possible acquisition or negotiations for acquisition by NBC of any NBC affiliated VHF television station, during the period May 18, 1951 to the date of service of said motion;

(b) RCA's or NBC's reasons for establishing the letters RC or RCA as part of the station call letters of NBC's Owned and Operated Stations during the period January 1, 1923 to the date of service of said motion;

(c) NBC's willingness to sell advertising time on the NBC Owned Stations, whether television or radio, as a group, and/or NBC's methods for charging advertisers for such purchases, during the period January 1, 1947 to the date of service of said motion;

(d) The decision by Westinghouse Broadcasting Company to terminate its national spot sales representation agreement with the NBC Spot Sales Division for its radio stations, on or about January 1, 1949,
36 and its decision to terminate such representation by the NBC Spot Sales Division of its television stations in 1953 or 1954, during the period January 1, 1948 to the date of service of said motion;

(e) The present affiliation status of the Westinghouse Broadcasting Company's television stations with NBC;

(f) The advantages to RCA in the sale of its consumer products, including color television receivers, of NBC's ownership and operation of a station in Philadelphia, during the period January 1, 1945 to the date of service of said motion;

6. All documents and other writings or recordings of every kind not heretofore described in 1 above, which are in the possession or control of RCA or NBC, their officers, directors, agents, representatives or employees, and which were prepared, sent or received by RCA or NBC or their employees, which contain or reflect:

(a) The broadcasting time devoted by (1) NBC owned television stations and (2) NBC affiliated (other

than NBC owned) television stations, to NBC black and white television network programs and NBC color television network programs, during the period January 1, 1953 to the date of service of said motion, and all comparisons of such data during said period;

(b) The broadcasting time devoted by television station WPTZ, Philadelphia, during its ownership by Westinghouse Broadcasting Company:

(1) To carrying NBC color television network programs in color and black and white;

(2) To carrying NBC network color television programs in black and white only;

(3) To carrying NBC black and white television network programs;

(4) To originating its own television programs in black and white; and

(5) To originating its own television programs in color;

37 (c) The broadcasting time devoted by television station WRCV-TV, Philadelphia, during its ownership by NBC, as broken down for WPTZ in subparagraphs (1)-(5) of (b) above;

(d) Comparisons of the matters described in (b) above with the matters described in (c) above;

(e) Predictions, prognostications or estimates, during the period January 1, 1954 to the date of service of said motion, comparing the broadcasting schedule of WPTZ with any planned or hypothetical broadcasting schedule of a proposed or owned NBC television station in Philadelphia, with respect to origin of the programs (network or local) or nature of the television signal (black and white or color).

The said documents are to be produced for examination at the offices of the Antitrust Division, Department of Justice, 10th Street and Pennsylvania Avenue, N. W., Washington, D. C., within fifteen (15) days from the date of entry of this order.

Those documents which plaintiff desires to photostat, photograph, or otherwise copy, may be retained for such purposes in plaintiff's possession and upon completion thereof shall be returned promptly to defendants.

ORDERED ....., 1957

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United States District Judge

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38 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted)

Answer of Radio Corporation of America and National Broadcasting Company, Inc.—Dated April 10, 1957

Defendants, Radio Corporation of America ("RCA") and National Broadcasting Company, Inc. ("NBC"), by their attorneys, answer the complaint herein as follows:

FIRST DEFENSE

1. Defendants admit that plaintiff seeks to invoke the jurisdiction of this court under Sections 1 and 4 of the Sherman Act, but deny that they or either of them are or have been violating or will violate those provisions of law either in the respects alleged in the complaint or otherwise. In further answer to paragraph 1 of the complaint, defendants aver that the Federal Communications Commission (the "Commission"), in the exercise of the exclusive jurisdiction granted to it by the Congress of the United States, has approved and authorized the exchange of television and radio stations which is the subject of this action
39 and that, as set forth more fully in the following defenses, plaintiff has unlawfully attempted to invoke the provisions of the Sherman Act herein.

2. Defendants admit the allegations in paragraph 2 of the complaint.

3. Defendants deny that plaintiff's definitions of the words and phrases defined in paragraphs 3 (b), (c), (d),

(f) and (g) of the complaint accord with industry usage, and deny that the term defined in paragraph 3(e) has any significance or usage in the industry.

4. Defendants deny the allegations in paragraph 4 of the complaint, except they admit that RCA has been made a defendant herein because plaintiff has chosen to do so, that RCA is a Delaware corporation, that it is engaged, among other things, in the manufacture and sale of products, parts and accessories used in the transmission and reception of television and radio signals, and that its total annual sales of products and services, including those of its subsidiaries, are as alleged.

5. Defendants admit the allegations in paragraph 5 of the complaint, except they deny that NBC had acquired the UHF television broadcasting station in New Britain, Connecticut, at the time of the filing of the complaint, and deny that NBC acts as sales representative for any stations owned by others, except in the sale of national spot advertising (advertising purchased by a national or regional advertiser on a station-by-station basis). In further answer to paragraph 5 of the complaint, defendants aver that the business of NBC is more accurately described as including the rendering of network services to its own radio and television stations and to stations owned by others.

6. Defendants deny the allegations in paragraph 6 of the complaint, except they admit that the sale of advertising is essential to the operation of commercial television and radio networks and stations, and that advertising of network advertisers is conveyed across state lines to television and radio stations throughout the United States which frequently broadcast such advertising across state lines to viewers and listeners within their range.

7. Defendants deny the allegations in paragraph 7 of the complaint. In further answer thereto, they aver that networks and "station groups" do not compete as alleged in paragraph 7. There is vigorous competition for national spot advertising and local advertising (advertising purchased by a local advertiser from a station in his locality) among stations offering similar coverage, whether or not

such stations are owned by multiple-station owners. There is also vigorous competition among NBC and others for representation of stations in the sale of national spot advertising, whether or not such stations are owned by multiple-station owners.

8. Defendants admit the allegations in paragraph 8 of the complaint.

41 9. Defendants admit the allegations in paragraph 9 of the complaint, except they deny that network affiliation is essential to the economic survival of television stations, and that station breaks may properly be characterized as providing "valuable advertising for the station owner".

10. Defendants admit the allegations in paragraph 10 of the complaint (insofar as they relate to the revenues of ABC and CBS, on information and belief based on published reports of the Commission) and aver that National Telefilm Associates, Inc. represents itself to be a fourth national television network.

11. Defendants admit the allegations in paragraph 11 of the complaint (insofar as they relate to revenues and sales, on information and belief based on published reports of the Commission).

12. Defendants admit the allegations in paragraph 12 of the complaint, and in further answer thereto aver that there are numerous other manufacturers of the commodities referred to therein.

13. Defendants deny the allegations in paragraph 13 of the complaint, except they admit the allegations in the first and second sentences thereof, and admit that Westinghouse Electric Corporation has plants in the Philadelphia area. Defendants further admit that RCA, and other manufacturers, have plants in the Philadelphia area at which they manufacture some of the products, parts and accessories, described in paragraph 12 of the com-
42 plaint, which they ship to and sell in states of the United States other than the state of their manufacture. In further answer to the allegations in paragraph

13, defendants aver that a fourth VHF television station, WPFH, also serves the Philadelphia area.

14. Defendants admit the allegations in paragraph 14 of the complaint.

15. Defendants admit the allegations in paragraph 15 of the complaint.

16. Defendants deny the allegations in paragraph 16 of the complaint, except they admit that Westinghouse Broadcasting Co., Inc. ("WBC"), a wholly owned subsidiary of Westinghouse Electric Corporation, owned and operated or was an applicant for television stations in the markets and having the affiliations referred to in the first two sentences of paragraph 16. They admit that WBC was the only non-network station owner with VHF stations in Philadelphia, Boston and San Francisco, a fact having neither significance nor relevance in this action.

Plaintiff's references to "markets 4 through 7" and to "the 8 primary markets" are not relevant to the competitive position of WBC. The WBC television stations in Philadelphia, Boston and San Francisco were important competitors of other television stations in the same markets, but not of any television stations owned and operated by NBC, none of which was located in those markets.

43 17. Defendants admit the allegations in paragraph 17 of the complaint, except they deny that Dumont sold WDTV to WBC on December 3, 1954 and aver that on that date the parties agreed to such a sale, but that the sale did not occur on that date and could not take place until subsequently, after the parties had sought and received approval of it by the Commission.

18. Defendants deny the allegations in paragraphs 18, 19, 20, 21, 22 and 23 of the complaint, except they admit that on May 16, 1955 WBC and NBC agreed, among other things, that the parties would exchange their respective television and radio broadcasting facilities in Cleveland and Philadelphia and that NBC would pay WBC $3,000,000, the amount agreed upon as representing the difference in value between their respective facilities, provided that the Commission approved such an exchange as required by law.

WBC and NBC each entered in to the exchange agreement in furtherance of its own legitimate self-interest and each thereafter sought approval of the agreement from the Commission. The Commission authorized and approved the exchange as being in the public interest and, in good faith reliance on that determination, the parties effected the exchange on January 22, 1956. Neither the agreement nor its consummation violated any statute or policy of the United States. On the contrary, the exchange was consistent with the public interest, as determined by the Commission, and has proven to be beneficial to the industry, to the people of Philadelphia, and to the public at large.

Second Defense

19. The complaint fails to state a claim upon which relief can be granted.

44

Third Defense

20. The exchange of broadcasting facilities complained of in this action was agreed upon by WBC and NBC on May 16, 1955. Before the exchange could take place, both parties were required by law to file applications requesting the Commission's approval.

21. The exchange applications were filed with the Commission on June 15, 1955, and thereafter the Commission directed its staff to make a full investigation of the proposed exchange. The Commission staff investigated the facts concerning the proposed exchange, interviewed the WBC and NBC officials and others involved in the transaction, and examined in detail the files, records and other relevant material.

22. On August 12, 1955, the Commission notified the Antitrust Division of the Department of Justice that applications for approval of the exchange agreement were pending before it and that possible antitrust questions were raised. Thereafter, the Commission and the Antitrust Division conferred and exchanged information, and the Antitrust Division was continuously informed by the Commission as to the facts relating to the exchange.

23. On October 17, 1955, the Commission directed its Secretary to issue letters pursuant to the Communications Act of 1934, to WBC and NBC stating the various issues, including the antitrust issues, which the Commission believed were raised by the applications.

24. On November 16, 1955, WBC and NBC filed answers to the Commission's letters, furnishing detailed data.
45 In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

25. On December 21, 1955, the Commission granted the exchange applications. This action was within the exclusive jurisdiction reposed in the Commission by the Congress and was a proper exercise of the Commission's expert judgment.

26. On January 22, 1956, in reliance on the Commission's determination, WBC and NBC effected the exchange as approved and authorized by the Commission.

27. At no tme did the Antitrust Division intervene in the proceedings before the Commission. Nor did the Antitrust Division protest the action of the Commission or request a rehearing. The Antitrust Division failed to avail itself of the procedures made mandatory by the Congress to obtain modification of the Commission's action. That action has become final and is not subject to attack.

28. This action is barred by the administrative finality of the Commission's action.

Fourth Defense

29. By reason of the facts alleged in paragraphs 20 through 27 of this answer, this Court lacks jurisdiction over the subject matter of this action.

46

Fifth Defense

30. By reason of the facts alleged in paragraphs 20 through 27 of this answer, plaintiff is barred from maintaining this action by the doctrines of res judicata and collateral estoppel.

WHEREFORE, defendants demand judgment dismissing plaintiff's complaint and awarding to them the costs of this action.

/s/ BERNARD G. SEGAL
Bernard G. Segal,

/s/ EDWARD W. MULLINIX
Edward W. Mullinix,
Attorneys for defendants.

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63 Wall Street,
New York 5, New York,
Of counsel.

April 10, 1957.

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47 IN UNITED STATES DISTRICT COURT

Plaintiff's Answer to Defendant's Interrogatories

(Excerpts from)

* * * * * * * * * *

Interrogatory No. 14

Plaintiff claims that the following types of trade and commerce were restrained by defendants:

(1) The trade and commerce of Westinghouse Electric Corporation in the Philadelphia market and throughout the United States in radio receivers, black and white and color television receivers, radio and television receiving tubes, picture tubes and transistors.

(2) The trade and commerce of independent station advertising representatives including Peters, Griffin & Woodward, Inc. (formerly Free and Peters, Inc.), 250 Park Ave., New York, N. Y.; Blair-TV, 415 Madison Ave., New York, N. Y.; The Branham Company, 99 Park Ave., New York, N. Y.; George P. Hollingberry Company, 307 N. Michigan Ave., Chicago, Ill.; H-R

Television, Inc., 380 Madison Ave., New York, N. Y.; The Katz Agency, Inc., 477 Madison Ave., New York, N. Y.; Edward Petry & Co., Inc., 3 E. 54th St., New York, N. Y.; Paul H. Raymer Co., Inc., 444 Madison Ave., New York, N. Y.; and Weed Television Corporation, 579 Fifth Ave., New York, N. Y., who
48 have sold, or might sell, national spot and local advertising on the Philadelphia television and radio stations formerly owned by WBC.

(3) The trade and commerce of WBC, RKO Teleradio Pictures, Inc., and Storer Broadcasting Company, Triangle Publications, Inc. and DuMont Broadcasting Corp., in the sale of broadcasting time to national spot advertisers on their television and radio stations, both as groups and individually, and in the sale of broadcasting time to local advertisers on their individual television and radio stations.

(4) The trade and commerce of Bremer Broadcasting Corporation, New York, New York—Newark, New Jersey; New York News, New York, New York; Chicago Tribune Co., Chicago, Illinois; Copley Press, Inc., Los Angeles, California; Paramount Pictures, Inc., Los Angeles, California; The Times-Mirror Co., Los Angeles, California; Philadelphia Bulletin, Philadelphia, Pennsylvania; Evening News Association, Detroit, Michigan; and Chronicle Publications Company, San Francisco, California, in the sale of broadcasting time to national spot and local advertisers on their television and radio stations located in the eight primary markets.

(5) The potential competition by independent Philadelphia stations for programs and advertising furnished to the Philadelphia market by NBC.

49 (6) Plaintiff further claims that the combination and conspiracy alleged necessarily involved restraints in one of the remaining eight primary markets where NBC owned no VHF television station. Such restraints would be similar to those described in (2) (3) (4) and (5) above. In addition, defendants sought to retrain the trade and commerce of Westinghouse Electric Corporation, which is described in (1) above, in the Boston market.

With respect to the "time when" the restraints described in (1)-(6) above were imposed or sought to be imposed by defendants, they were imposed or contemplated throughout the period of the conspiracy alleged in the complaint.

Interrogatory No. 15

(a) The alleged combination or conspiracy was entered into in or about March 1954. It is believed that said combination or conspiracy attained substantially the form alledged in the complaint at or about the above date at a meeting held in the office of David Sarnoff, then Chairman of the Board of RCA, 30 Rockefeller Plaza, New York, New York.

(b) David Sarnoff, Robert W. Sarnoff, Charles R. Denny, Joseph V. Heffernan, Harry Bannister, Emanuel Sacks, all located in the RCA Building, New York, New York.

(c) David Sarnoff and Frank M. Folsom, located in the RCA Building, New York, New York.

(d) No others are known to plaintiff at this time.

(e) Yes.

(1) In February or March 1954, Charles R. Denny apparently prepared a written memorandum or analysis or operating plan for improving the position of NBC's owned or operated stations. (Plaintiff has no copy of this document).

50 (2) In or about March 1954, Charles R. Denny made a written or oral presentation or analysis to Robert W. Sarnoff embodying this plan. (Plaintiff has no copy of this presentation).

(3) Shortly thereafter, Charles R. Denny and Robert W. Sarnoff made substantially the same written or oral presentation or analysis to David Sarnoff, and David Sarnoff approved the terms thereof at that time. (Plaintiff has no copy of this presentation).

(4) In the spring of 1954, Charles R. Denny made substantially the same presentation or analysis to Joseph V. Heffernan. (Plaintiff has no copy of this presentation).

(5) On June 1, 1954, the express terms of the combination or conspiracy referred to above were embodied in a memorandum written by Harry Bannister to David Sarnoff on the Detroit situation. (NBC-RCA No. 272).

(6) On June 28, 1954, the express terms of the combination or conspiracy referred to above were embodied in a memorandum written by Charles R. Denny to David Sarnoff on the subject, "Purchase of a TV Station in San Francisco". (NBC-RCA No. 188)

(7) On September 28, 1954, Charles R. Denny, Robert W. Sarnoff, and Joseph V. Heffernan reiterated one or more of the express terms of the combination or conspiracy referred to above in a conference with E. V. Huggins and Chris J. Witting of Westinghouse Broadcasting Company. (WBC-WEC Nos. 11 and 12)

51 (8) Shortly after the conference referred to in (7) above, David Sarnoff reiterated one or more of the express terms of the combination or conspiracy referred to in a meeting with Chris J. Whitting of WBC.

(9) Shortly after the conference referred to in (7) above, David Sarnoff reiterated one or more of the express terms of the combination or conspiracy referred to in a meeting with E. V. Huggins of WBC.

(10) On November 5, 1954, Joseph V. Heffernan and Charles R. Denny in a conference with Chris J. Witting and John W. Steen stated one or more of the express terms of the combination or conspiracy. (WBC-WEC Nos. 13 and 14)

(11) On November 10, 1954, Charles R. Denny and Joseph V. Heffernan at a conference with E. V. Huggins, Chris J. Witting and John W. Steen, reiterated certain express terms of the combination or conspiracy. (WBC-WEC No. 16; NBC-RCA No. 147)

(12) One or more of the express terms of the combination or conspiracy were embodied by David Sarnoff in statements made by him to E. V. Huggins at a meeting which took place during the period November 10-15, 1954.

(13) On December 30, 1954, Joseph V. Heffernan outlined one or more express terms of the combination or conspiracy in a meeting with WBC representatives. (NBC-RCA No. 61)

(14) On January 5, and/or 6, 1955, Joseph V. Heffernan or Charles R. Denny outlined one or more express terms of the combination or conspiracy in a meeting with WBC representatives. (NBC-RCA Nos. 58, 62 and 63)

(f) The combination or conspiracy or continuing agreement was partly in writing and partly oral. The documents and conversations containing the terms of said combination or conspiracy or continuing agreement are furnished in answer to question 15 (e) above and 15 (i) and (j) below.

(h) Plaintiff does not claim that the terms of the combination or conspiracy were or were not ever modified. However, plaintiff does claim that NBC has not yet disposed of its owned and operated VHF television station in Washington, nor obtained a VHF television station in Boston, Detroit or San Francisco.

(i) Yes.

(1) Adoption of the Denny operating plan by officials of NBC and RCA.

(2) Approval of that plan by the RCA and NBC boards of directors.

(3) Negotiations with Walter Annenberg concerning the possible acquisition by NBC of WFIL-TV in Philadelphia, March-October 1954. (Triangle Documents 1, 2 and 3)

(4) Negotiations with officials of the Detroit News and WWJ-TV in Detroit concerning the possible acquisition by NBC of that station. (NBC-RCA No. 272)

(5) Negotiations with officials of the San Francisco *Chronicle* and KRON-TV in San Francisco concerning the possible acquisition by NBC of that station. (NBC-RCA Nos. 177, 178, 179, 180, 187, 188, 189, 190, 191 and 196)

53 (6) Approach by Joseph V. Heffernan in the fall of 1954 to Tom O'Neil, owner of WNAC-TV in Boston concerning the possible acquisition by NBC of that station. (RKO 1, 2 and 3)

(7) A conference held on September 28, 1954, and described in answer 15(e)(7) above. (WBC-WEC Nos. 11 and 12)

(7) The meetings and conferences described in answer 15(e)(8)(9)(10)(11)(12)(13) and (14) above. (WBC-WEC Nos. 13, 14 and 16; NBC-RCA Nos. 58, 61, 62, 63, 147)

(9) Office memorandum of David Sarnoff dated November 5, 1954. (NBC-RCA No. 150) and draft letter which was forwarded by Witting letter of November 5, 1954. (NBC-RCA No. 22)

(10) Re-draft by T.E.E. of Witting draft letter. (NBC-RCA No. 23)

(1) Letter from E. V. Huggins to David Sarnoff dated November 15, 1954. (NBC-RCA No. 24)

(12) Letter from J. V. Heffernan to E. V. Huggins dated November 17, 1954. (NBC-RCA No. 25)

(13) Letter from Chris J. Witting to Joseph Heffernan dated November 29, 1954. (NBC-RCA No. 26)

(14) Letter from J. V. Heffernan to E. V. Huggins dated December 14, 1954. (NBC-RCA No. 365)

(15) Draft letter from General Sarnoff to E. V. Huggins dated January 6, 1955 and draft letter
54 from E. V. Higgins to General David Sarnoff, same date. (WBC-WEC No. 19)

(16) Authorization by NBC board of directors of Philadelphia-Cleveland exchange on January 7, 1955. (NBC-RCA No. 51)

(17) Letter from E. V. Huggins to Gwilyn A. Price dated January 7, 1955. (WBC-WEC No. 20)

(18) Memorandum from Chris J. Witting to E. V. Huggins dated January 21, 1955. (WBC-WEC No. 21)

(19) Hand-written memorandum of May 6, 1955 signed by Joseph V. Heffernan with attached typewritten memorandum of same date. (NBC-RCA No. 20)

(20) Hand-written memorandum of May 9, 1955 signed by Joseph V. Heffernan. (NBC-RCA No. 21)

(21) Draft letter from E. V. Huggins to David Sarnoff dated May 9, 1955 and draft letter from David Sarnoff to E. V. Huggins, same date. (WBC-WEC No. 23)

(22) Letter from David Sarnoff to E. V. Huggins dated May 13, 1955. (NBC-RCA No. 29)

(23) NBC-WBC aepplication for consent to assignment of licenses filed with the FCC June 15, 1955, Exhibit No. I-3 (NBC-RCA No. 30).

(j) Plaintiff claims that concert of action between RCA and NBC pursuant to the combination, conspiracy or continuing agreement alleged in the complaint is shown in each of the following "instances":

(1) Negotiations by David Sarnoff (RCA-NBC) and Emanuel Sacks (NBC) with Walter Annenberg (Triangle Publications) concerning the possible acquisition by NBC of WFIL-TV in Philadelphia, March-October 1954 (Triangle Nos. 1, 2 and 3).

55 (2) Conference between David Sarnoff, Robert W. Sarnoff (NBC), Charles R. Denny (NBC), Joseph V. Heffernan (NBC), and E. V. Huggins (WBC-Westinghous Electric Corp.) in mid-October, 1954.

(3) Receipt of letter of Chris J. Witting (WBC) dated November 5, 1954 by David Sarnoff (NBC-RCA No. 22), referral of said letter to Joseph V. Heffernan and consideration of said letter by NBC board of directors (NBC-RCA No. 150) and ensuing conference with respect thereto between Joseph V. Heffernan, Charles R. Denny, Chris J. Witting and John W. Steen (WBC) (WBC-WEC Nos. 13 and 14).

(4) Conference during period November 10-15, 1954, between David Sarnoff and E. V. Huggins, followed by

letter from E. V. Huggins to David Sarnoff of November 15, 1954 (NBC-RCA No. 24), and letter of Joseph V. Heffernan to E. V. Huggins of November 17, 1954 (NBC-RCA No. 25).

(k) Plaintiff claims that the overt acts described below were performed by officials of RCA and NBC on behalf of both RCA and NBC and pursuant to or in furtherance of the alleged combination or conspiracy:

(1) Those acts described in answers numbered (5)(6)(7)(8)(9)(10)(11)(12)(13) and (14) of Interrogatory 15(e), and in answers numbered (3)(6)(9)(12)(14)(16)(19)(22)(23) and (24) of Interrogatory 15(i), above.

(2) A telephone conversation of November 5, 1954 between David Sarnoff (RCA-NBC), and Chris J. Witting (WBC) during which Sarnoff refused
56 to assure WBC of NBC affiliation in Pittsburgh until WBC had agreed to exchange its Philadelphia stations for NBC's Cleveland stations (NBC-RCA No. 22).

(3) A telephone conversation between David Sarnoff and Dr. Allen B. DuMont concerning NBC's interest in DuMont's Pittsburgh television station WDTV.

(m) Plaintiff claims that, to the best of its knowledge, the alleged combination or conspiracy still continues, since it has no evidence of any repudiation by defendants of their remaining objective as outlined by the Denny operating plan; namely, to acquire a VHF television station in Boston, Detroit or San Francisco and to dispose of NBC's VHF television station in Washington.

Interrogatory No. 16

(a) No.
(b) No.
(c) Both.
(d) Plaintiff claims that the conduct of the defendants was unlawful because they combined or conspired to unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Act.

(e) No. by NBC's "power to grant or withhold" from non-network station owners' NBC network affiliation for their television stations, plaintiff does not refer to any legal right of NBC to enter or not to enter affiliation contracts with stations by mutual agreement. Rather, plaintiff refers to NBC's power as one of the two leading nationwide television networks to force a network affiliate, as the price for continuance of its NBC television affiliation elsewhere, to agree to relinquish to NBC one of its television stations. To the extent that this combination or conspiracy has been effectuated in part, as alleged in paragraph 20 of the complaint, WRC, probably the most
57 powerful single NBC affiliate, was required as NBC's price for continuing television affiliation in Boston and assurances of affiliation in Pittsburgh and Cleveland, to relinquish its Philadelphia stations in exchange for NBC's Cleveland stations, plus three million dollars, despite the fact that this exchange meant a continuing loss to WBC of revenues in excess of one million dollars annually.

(f) Yes. Plaintiff claims that NBC has no right "to grant or to withhold from non-network station owners, NBC network affiliation for their television stations," when such action is part of a plan in violation of the antitrust laws.

(g) No.

(h) No.

(i) No.

(j) Plaintiff believes that the combination or conspiracy contemplated, as one of its terms, the unlawful use of the power of the defendant NBC, as a network, to grant or withhold network affiliation, upon any or all of the non-network television stations located in Philadelphia, Detroit, San Francisco, Boston and Pittsburgh. Plaintiff claims that the following non-network television station owners were the objects of such unlawful use of power: Westinghouse Broadcasting Company, New York, New York; The Detroit News, Detroit, Michigan; San Francisco Chronicle, San Francisco, California.

(k) Yes. In addition to the acts alleged in paragraphs 20 and 21 of the complaint, the following acts were done pursuant to and in furtherance of the alleged combination or conspiracy:

(1) In March 1954, Walter Annenberg, owner of WFIL-TV in Philadelphia, was approached by Emanuel Sacks of NBC and David Sarnoff of RCA and NBC with the view toward ascertaining the availability for sale to NBC of his station.

58 (2) In May 1954, Harry Bannister of NBC, acting under the direction of David Sarnoff of RCA and NBC, approached Roy Merrill, Vice President and General Manager and active operating head of the Detroit News, to ascertain the availability for sale to NBC of WWJ-TV, and through other NBC employees under Bannister's direction attempted to obtain national spot advertising representation of WWJ-TV and WWJ for NBC Spot Sales Division.

(3) In July 1954, Charles R. Denny of NBC, acting under the direction of David Sarnoff of RCA and NBC, approached the owners of KRON-TV in San Francisco with the view of ascertaining the availability for sale to NBC of that station.

(4) In August or September 1954, Joseph V. Heffernan of NBC approached Thomas O'Neil of RKO Teleradio Pictures, Inc. with a view of ascertaining the availability for sale to NBC of WNAC-TV in Boston, Massachusetts. (RKO Nos. 1 and 2)

(5) During the fall of 1954, David Sarnoff of RCA and NBC may have approached Dr. Allen B. Dumont, owner of television station WDTV in Pittsburgh, Pennsylvania, with a view toward ascertaining the availability for sale to NBC of that station.

(6) As has already been mentioned in the answer to Interrogatory No. 15(i)(2) above, the NBC and RCA Boards of Directors both approved and ratified the Denny operating plan.

(7) On May 13, 1955, David Sarnoff of RCA and NBC wrote to E. V. Huggins of Westinghouse:

> . . . the agreement being signed today . . . will mean that our plans for station ownership in the East, which are of such importance will be complete.
>
> I am convinced the agreement we are signing to-

day is a good one, and I am confident that our cordial relations will continue for many years to come.

Interrogatory No. 17

(a) The acts allegedly performed by or on behalf of RCA in depriving WBC and Westinghouse Electric
59 of WBC's VHF station in Philadelphia are set forth in the answers to Interrogatories 15(j) and 15(k) above, excepting from 15(k) the references to 15(e)(5) and (6).

(b) Yes. Plaintiff claims that Westinghouse Electric has an additional interest in having a WBC VHF television station in Philadelphia because of its capacity as a manufacturer, distributor, seller and advertiser of consumers products in that market.

(c) The deprivation which plaintiff charges in paragraph 20 of the complaint is WBC's exclusion, as a VHF television broadcaster, from the Philadelphia market through the effectuation of the combination and conspiracy alleged in paragraph 20.

(d) No.

(e) No.

(f) No.

(g) No.

(h) No. However, because network affiliation is generally essential to the economic survival of television stations, and network affiliation other than NBC affiliation is, or may appear to be, unavailable to a particular station in a particular market, NBC affiliation is, or may appear to be, essential to the economic survival of a television station in such a market at a given point or during a given period of time. Thus, plaintiff claims that WBC believed, and had good reason to believe at that time, that CBS television affiliation was and would continue to be unavailable in Philadelphia, Boston and Pittsburgh, and that television affiliation with ABC in those three markets was at that time and might continue to be unprofitable.

(i) No, as to any rule, regulation or policy of the Federal Communications Commission. Plaintiff claims that every act and threat alleged to have been done in the course of the combination or conspiracy between RCA and NBC violated Section 313 of the Communications Act of 1934.

60 (j) Plaintiff claims that there was a definite agreement for the transfer of WBC's Philadelphia station to NBC on or about November 5, 1954.

(1) The exact consideration and other precise terms of the agreement were still the subject of negotiation at that time.

(2) and (3) This agreement was made orally between David Sarnoff of RCA and NBC and E. V. Huggins of Westinghouse Electric and WBC. The substance of the conversation was that Huggins assured David Sarnoff that WBC would continue to negotiate the terms of the agreement in good faith, and in return that WBC would want from Sarnoff and NBC whatever assurances it could legally get that NBC would not enter the Boston market with its own TV station, that WBC could look forward to continued NBC affiliation in Boston, and that NBC would grant television affiliation for Pittsburgh. After this agreement had been reached by David Sarnoff and E. V. Huggins, Robert W. Sarnoff, Charles R. Denny and Joseph V. Heffernan were called in to David Sarnoff's office and the principles of agreement were made known to them. This oral agreement was verified by a letter of November 15, 1954 from E. V. Huggins to David Sarnoff, and assurance of NBC affiliation for the new WBC television station in Pittsburgh was contained in a letter of November 17, 1954 from J. V. Heffernan to E. V. Huggins.

(4) On or about January 6, 1955 accord was reached as to the exact consideration and other precise terms of the agreement.

* * * * * * * * *

61 *Interrogatory No. 24*

(a) The offenses to which plaintiff refers in paragraph 22 of the complaint are: (1) the combination or conspiracy alleged in paragraphs 18 and 19 of the complaint,
62 and (2) the contract described in paragraph 21 of the complaint. Plaintiff claims that "the respect in which and basis on which . . . such conduct was illegal" is that it constitutes a violation of Section 1 of the Sherman Act.

(b) The answer to this interrogatory is set forth in the answer to Interrogatory No. 15(m) above.

(c) Plaintiff claims that the following relief is necessary and indispensable to insure that these offenses will cease:

(1) Divestiture of WRCV-TV and WRCV, Philadelphia, Pennsylvania, by sale to a non-network purchaser;

(2) Approval of this Court before any future acquisition is made by NBC of a VHF television station in any of the eight primary markets;

(3) Injunctive relief (a) against any future illegal use by NBC or RCA of NBC's network power to force or require a non-network station owner to sell its broadcasting station to NBC, and (b) against the use of such power to force or require any non-network station to permit the NBC Spot Sales Division to represent it in the sale of national spot advertising.

(d) No. Plaintiff claims that such order should remain in effect in all respects except that the plaintiff here seeks a judgment ordering and/or decreeing that the licenses of NBC's Philadelphia stations be revoked and that all rights under such licenses shall thereupon cease.

(e) See answers to Interrogatory 24 (c) and (d) above.

Interrogatory No. 25

(a) Yes.

(b) Plaintiff does not know at this time all of the effects of the alleged offenses, but one of their additional effects not stated in paragraph 23 of the complaint was to reduce the ability of Westinghouse Electric to compete with RCA and others in the sale of all products which Westinghouse Electric manufactures which are offered for sale to consumers in the Philadelphia market area.

63 (c) No.

(d) No.

(e) No. Plaintiff makes no claim as to how the exchange could have been effected to avoid such results.

BERNARD M. HOLLANDER

RAYMOND M. CARLSON
United States Department of Justice
Attorneys

64 *Interrogatory No. 27*

Plaintiff contends that the effect described in paragraph 23(c) of its complaint would be present in any market where a network acquired a station pursuant to a combination or conspiracy and contract which violated the Sherman Act. Plaintiff contends that the effect described in paragraph 23(b) of its complaint would not necessarily be present in any market where a network acquires a station pursuant to a combination or conspiracy and contract which violates the Sherman Act, and in support of its contention states that the owned and operated television stations of the ABC network are represented by independent advertising representatives.

* * * * * * * * * *

65 *Interrogatory No. 31*

(a) Yes.

(b) WRCV-TV and WRCV, Philadelphia, Pennsylvania. Divestiture of such assets is necessary and indispensable to dissipate the effects of the illegal combination or conspiracy and contract in the Philadelphia market and throughout the United States, to deprive defendants of the fruits of their unlawful conduct, and to restore competition which has been reduced by reason of the effectuation of the illegal combination or conspiracy and contract.

66 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

(Title omitted)

Philadelphia, Pa., Tuesday, May 14, 1957.

Before Hon. William H. Kirkpatrick, Ch.J. (In Chambers).

Transcript of Hearing Sur Plaintiff's Objections to Interrogatories: Plaintiff's Motion to Produce Documents: Defendants' Motion to Produce Documents

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67 **Appearances**

William H. Maher, Esq., Bernard M. Hollander, Esq., Raymond M. Carlson, Esq., Attorneys, U. S. Department of Justice.

Schnader, Harrison, Segal & Lewis, By Bernard G. Segal, Esq., Edward W. Mullinix, Esq., Cahill, Gordon, Reindel & Ohl, By Lawrence J. McKay, Esq., Dennis G. McInerney, Esq., Attorneys for Defendants.

Philip C. Patterson, Esq., Representing Philco Corporation.

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68 Mr. Maher: Judge Kirkpatrick, may I present Mr. Bernard Hollander and Mr. Raymond Carlson. They are attorneys of the Department of Justice, Washington, handling this matter. I am just an innocent bystander.

(Discussion off the record.)

Mr. Segal: Judge, we have three matters before you. We could take them up chronologically, which I suppose would then have everybody feeling that it had been by chance rather than by choice, although I am not wedded to any order. If we took them up chronologically we would

first take up the Government's Rule 34 motion. Then we would take up the Government's objections to certain of our interrogatories.

The Court: Well, take them up chonologically, unless somebody sees an objection to it.

Mr. Hollander: Yes, sir, that would be fine.

Mr. Segal: I don't know whether at the outset you would like us to tell you something about what the case concerns, Your Honor.

The Court: Surely. I know nothing whatever about this case.

Mr. Hollander: I guess we then start, is that
69 right, Mr. Segal?

Mr. Segal: I don't care.

Mr. Hollander: If it is our motion.

Mr. Segal: I thought a summary of the issues, you can either speak and I would before we get to the motion, or vice-versa.

Mr. Hollander: All right, sir. I was merely going to give a description of the pleadings first, because I thought it might help His Honor if he hasn't had a chance to go over it.

Mr. Segal: Go ahead, and then I will reply, if it should be necessary.

Mr. Hollander: Certainly.

Your Honor, the Government's complaint was filed on December 4, 1956. On January 15, 1957 defendant served on the plaintiff 34 written interrogatories. That is 34 by number, but by actual count I would assume around 500 questions. To these we have interposed objections to a few.

The Court: How many interrogatories are there all together?

Mr. Hollander: There are 34, Your Honor. All have been answered save No. 34, and those which are still
70 objected to, which are 15(g) and (1).

The Court: Well, now, let's see, If we are going to talk about them——

Mr. Segal: We are not going to talk about them at this point, Judge. Rule 34 comes first.

The Court: Then you needn't specify them.

Mr. Hollander: All right, sir. In any case, there are parts of six other interrogatories beside 34.

The Court: I will have to come to that. Just tell me what the suit is about, that is all I want now.

Mr. Hollander: Yes, sir. There are very few factual issues, and the offenses are charged in four short charging paragraphs of the complaint, paragraphs 18 to 21.

We charge first a combination or conspiracy in restraint of trade by which NBC and RCA conspired or combined to use we believe unlawfully the power of NBC as a network to obtain two additional so-called very high frequency stations in what we call the eight primary markets of the United States. That is the eight leading markets. They already had five stations, which is all they were permitted to have under the regulations of the
71 Communications Commission.

The Court: Is this television, radio, or both?

Mr. Hollander: This is television, Your Honor. But it also involves radio to some extent, because most of these television stations have accompanying radio stations which are also owned by the networks.

We charge that this conspiracy or combination has been carried out in part, effectuated in part, by the exchange of stations which the Westinghouse Broadcasting Company owned in Philadelphia, radio and television stations, or stations which the National Broadcasting Company owned in Cleveland. But this is charged as only part of the effectuation.

A short period is charged, Your Honor. We charge that the conspiracy began on or about March of 1954, so that is a short period, as you can see.

In addition, we charge that the contract itself whereby Westinghouse and NBC agreed to exchange stations was an unreasonable restraint of trade and therefore illegal. That is the gist of the Government's charging paragraphs, Your Honor.

Mr. Segal: I think it would help, Judge, if I told
72 you a little of the background,——

The Court: Yes, go ahead.

Mr. Segal: —so that we can follow this. Although admittedly I will be adverting to facts which may or may not be agreed, I will try to tell where that is the case.

The Court: Is the answer filed yet?

Mr. Segal: Yes, there is an answer filed.

The Court: All right.

Mr. Segal: In general, the answer contains a denial and then contains one affirmative defense, which is one of the reasons I think I would like to give you some of the facts.

The affirmative defense is to the effect that this whole transaction was approved by the Federal Communications Commission after intensive investigation, and the legal effects that flow from that.

As Mr. Hollander has said, the case does involve the exchange of stations. You will recall that Westinghouse had what used to be called WPTZ here in Philadelphia.

The Court: No, I don't recall that.

Mr. Segal: Well, that was a television station. And KYW, a radio station. NBC had a television and
73 radio station in Cleveland. The exchange to which Mr. Hollander referred was the exchange of the Westinghouse Philadelphia stations for the NBC Cleveland stations.

Another incident of the exchange was that after very intensive negotiations they had arrived at a $3,000,000 figure as being the difference in the value of the stations. They arrived at the difference in earning capacity based on prior earnings of the stations——

The Court: Was that in favor of Philadelphia?

Mr. Segal: That is in favor of Philadelphia—so that NBC, based on a capitalization of those earnings, paid $3,000,000 to Westinghouse, in addition to turning over the Cleveland stations. In return for the Cleveland stations and the $3,000,000, Westinghouse turned over the Philadelphia stations.

I just want to give you very briefly the background of the exchange. I might say, first of all, that the results of the investigation before the FCC, which normally would be unavailable to us, have become available because of certain congressional inquiries in which all of the reports of the staff were put into evidence. Of course, we had theretofore had the reports of certain commissioners in connection with its decision.

74 Contrary to the normal view, Judge, networks are not generally profitable. The amount of promotion and development that is required doesn't render them as bonanza operations. They therefore rely on what are called owned and operated stations. In other words, they rely for their real profits, their substantial profits

where they can make them, such as they have, on the stations which they themselves own and which they themselves operate.

The Court: What is the distinction? What do you mean when you say the networks are not profitable?

Mr. Segal: The network operations and its affiliates.

The Court: What is a network exactly?

Mr. Segal: A network is an accumulation of stations. For example, NBC will have let's say 200 stations affiliated with it.

The Court: But not owned by it.

Mr. Segal: Not owned in any way, directly or indirectly.

The Court: What do you mean, the affiliation is simply that they have contracts with them?

Mr. Segal: They have contracts with them whereby NBC supplies certain programs, has certain privileges
75 and sells to advertisers time on those stations under a division arrangement of the revenues with the station.

The Court: Well, now, for instance, on the Farm there, we get Baltimore and Washington programs particularly. We get all kinds of programs from Baltimore. That isn't limited to NBC or anybody else.

Mr. Segal: No. There is no station owned by a network in Baltimore.

Now, there are two possibilities. One is that a station will have an affiliation agreement with one of the broadcasting chains.

The Court: But they will also show——

Mr. Segal: They will have much of their independent-initiated programs, because the network supplies only a portion of the time that its affiliate uses.

The Court: All right. If NBC has a contract with a privately-owned station in Baltimore, can anybody else, Mutual or anybody else, go on that station?

Mr. Segal: It depends on the nature of the contract.

The Court: There are some that they can?

Mr. Segal: Oh, yes, there are many that they can.

76 The Court: That is what I thought.

All right, go ahead.

Mr. Segal: Now, these owned and operated stations, of course, are directly owned, and the rule of the Federal Communications Commission is that nobody, network or

otherwise, may own more than five what are called VHF, very high frequency stations.

Now, so that we aren't confused by them, I think for purposes of our argument today we can assume, can't we, Mr. Hollander, that UHF stations are not involved.

Mr. Hollander: I think so, certainly.

Mr. Segal: UHF are ultra high frequency stations, and their primary benefit is supposed to be that they will permit many more stations in an area than very high frequency. The band will permit of more channels than very high frequency.

Just for your general information, Philadelphia is served by four VHF stations, as I will come to in a moment. It is not yet served by any UHF, although this educational station that is in the news so much (I think it is WHYY) should soon be in operation.

I should say one other thing, and that is that just as I have said that owned and operated stations con-
77 stitute the major source of profitable operations for networks, so the profitableness of a station depends on the market in which it finds itself. For example, generally speaking New York is the No. 1 market. Mr. Hollander referred to five of the eight primary markets. I think he means by that the markets which are primary in population and in retail sales.

Mr. Hollander: Yes, sir.

Mr. Segal: So New York is the No. 1, Chicago No. 2, Los Angeles No. 3, Philadelphia No. 4, and so on. And just for purposes of keeping it in focus, Cleveland is No. 10, based on population and retail sales.

The competitive set-up among the networks in 1954—and I pick that date because you will recall, Your Honor, that Mr. Hollander said that the offenses charged begin about March, 1954, in the Paragraph 18 of the complaint. You see, it is the very first four words. The competitive situation in 1954 was that the three large networks, CBS, NBC and ABC, all had owned and operated stations in the first three markets, New York, Chicago and Los Angeles. Now, when it came to the next ones, NBC felt that it had cause for fear. ABC had Detroit, which was market No. 5, and San Francisco, which was market No. 7. CBS
78 had applications pending for Boston, which was

market No. 6, and St. Louis, which was market No. 9. So that——

Mr. Hollander: Excuse me. Also for Steubenville-Pittsburgh, which is market No. 8.

Mr. Segal: You mean——

Mr. Hollander: The reason I suggest that, I didn't want to interrupt you, Mr. Segal, but——

Mr. Segal: That is all right. You interrupt me any time you like.

Mr. Hollander: I would just like to say two things. First, there were only three stations at that time in Philadelphia. There is a fourth station in Wilmington.

Mr. Segal: I am going to develop that in a moment.

Mr. Hollander: Yes, sir. Secondly, CBS also had an application pending for its own station for a channel assigned to Steubenville, Ohio, which is outside of Pittsburgh, and it had asked the Commission if it were granted the channel to move that channel into Pittsburgh, which would be market No. 8.

Mr. Segal: Then in either event, you see, 5, 6, 7 and 8 markets would have been taken after the first three by two competitors, taking the facts as Mr. Hollander
79 has corrected them.

The Court: That is, they weren't in on any of those.

Mr. Segal: NBC wasn't in on any of those, but instead had market 10 and market 11. Cleveland is 10 and Washington, D. C. is 11.

The Court: NBC was already in Philadelphia?

Mr. Segal: No. All three were in the first three, New York, Chicago and Los Angeles. NBC was not in Philadelphia.

The Court: Oh, the first three. That is right. I was forgetting Philadelphia is No. 4.

Mr. Segal: Yes. We have a tendency to forget, Judge, that Philadelphia has fallen a little behind Los Angeles.

The Court: Yes, that is right.

Mr. Segal: So that NBC was in the position where competitively and profit-wise it was concerned about the fact that if the applications to CBS were granted, and in view of the operating stations of ABC, it was 10 and 11 as against their combination of 5, 6, 7, and 8, taking Mr. Hollander's correction.

80 Early in 1954, therefore, NBC decided to strengthen its position by trying to acquire owned and operated stations in lieu of these two. You see, it couldn't acquire any more unless it got rid of some, because it was limited to five. And it decided to try to acquire two of four cities, two stations——

The Court: Now, wait. They had New York and Chicago?

Mr. Segal: And Los Angeles. All three had that. They had Cleveland and Washington, which were ten and eleven. They were seeking to acquire two of these four, Philadelphia, which would have been No. 4.

The Court: They can only have five and they have to get rid of one of theirs.

Mr. Segal: Two of theirs if they were going to get two others.

The Court: Yes. They wanted to move up from Cleveland and Washington into something better.

Mr. Segal: That is right. And they sought Philadelphia, which was four, Boston, which was six, San Francisco, which was seven, or Detroit, which was five.

The Court: All right.

Mr. Segal: I won't go into their efforts elsewhere
81 at this time, but I will come to the Philadelphia situation.

At that time there were serving the Philadelphia market four TV stations, three located in Philadelphia. One was WFIL, which is the Inquirer station, as we know it, affiliated with ABC. One was WPTZ, the Westinghouse Station, which is the subject of the Government suit which was——

Mr. Hollander: I beg your pardon.

Mr. Carlson: I beg your pardon, that is not the subject of the suit.

Mr. Segal: All right. I say that colloquially. Which is involved in the Government suit.

Mr. Carlson: That is correct.

Mr. Segal: Which was affiliated with NBC. And WCAU, which was affiliated with CBS. And then serving Philadelphia, as anyone who watches the ball games knows, is WPFH, which is a station in Wilmington. That is a station which is independent and programs I think indiscriminately from various of the networks.

It came to the attention of NBC that it could acquire WFIL. I might just say in passing that under FCC regulations these affiliation contracts may not exceed
82 two years in duration, and that WFIL's was expiring in the near future and that it could be acquired. But according to the position of NBC, it felt a moral obligation to its long-term affiliate, Westinghouse, to first take up the situation with Westinghouse.

It therefore went to Westinghouse with this proposal, that it would turn over Cleveland and Washington to Westinghouse in return for Philadelphia and Boston, and would pay to Westinghouse in cash a capitalization of the difference in earnings to be negotiated.

After some negotiations, Westinghouse took the flat position that it would not give up Boston, and then Boston dropped out of the picture, as did Washington, and the negotiations therefore concerned themselves with Philadelphia and Cleveland.

Of course, a very substantial part of the negotiations concerned what the proper amount to be paid by NBC for the difference in earnings would be.

The Court: How much of this appears in the pleadings?

Mr. Segal: None of this appears in the pleadings. All of it appears in the printed reports of the FCC.

83 The Court: All right.

Mr. Hollander: I might say, if I may interrupt, a great deal of it appears in the answers which we filed to the interrogatories, answers to their interrogatories.

Mr. Segal: I think that it right, except as you get to nuances or details, I think the broad outline is generally agreed. You get, of course, to differences in motivations and so on, and I obviously don't intend to bind the Government by any of that.

On January 6, 1955, the parties agreed in principle. On May 16, 1955 the agreement which the Government charges was itself a restraint of trade in violation of Section 1 of the Sherman Act was entered into. That is May 16, 1955. The next month, on June 15, 1955, both NBC and Westinghouse applied to the Federal Communications Commission for authority to make the exchange. The Federal Communications Commission conducted a very intensive investigation, interviewed many people, as the reports of the staff show, and on December 21, 1955, which is the next

critical date, the Federal Communications Commission granted the application of NBC and Westinghouse by a vote of 5 to 1.

84 Now, I am only going to read two paragraphs of that to give you some notion of their reasons, in view of the affirmative defense in our complaint. I am reading from a statement by Commission Doerfer, which was joined in by Commissioner Mack.

Mr. Hollander: Just a minute, Mr. Segal.

Your Honor, we have no objection to Mr. Segal handling this in any way he wishes, but we don't feel that this is the time at which an argument should be made on a primary jurisdiction point.

The Court: I didn't really want an argument.

Mr. Segal: It is only for the fact that it gives.

The Court: I do want to know what the case is about. You will have to use your judgment about that.

Mr. Hollander: Yes, sir.

Mr. Segal: That is why I say I would quote only two paragraphs, so you can see the issue. We are going to have to argue these very much more at length some time or another on other phases of the case.

Commissioner Doerfer says:

"Ownership of stations in major networks was considered vital to the success of network operations. This has been the Commission policy.

85 Under it NBC moved to acquire the Philadelphia trading area in place of the Cleveland stations. The NBC's reason for requesting an exchange of these facilities is frankly stated. It is to the effect that the economic health of a company in the network business has been dependent upon profit from some other source. This is the ownership of stations. It is upon such stations that NBC has relied to carry out the important functions which networks perform and broadcasters desire and the public enjoys. It was not possible for NBC to acquire additional VHF stations without exceeding 5. NBC sought instead to exchange a currently owned station for another with greater earning potentials. Neither the multiple ownership rule nor prior Commission policy indicates that a company operating a network system should be discriminated against or penalized in the acquisition of

broadcasting stations simply because it is a network. Rather than being a serious deviation from Commission policy; the approval of the instant transaction is a consistent application of present rules and prior Commission policy."

86 I read that for the facts, and then——

Mr. Hollander: Just a moment. Your Honor, I feel I must say at this point that the Government's position is that his is just not appropriate at this point. We have no objection to agreeing with Mr. Segal that the FCC has a right to consent to the exchange of licenses of a broadcasting station. We don't think this has anything to do with what we are talking about.

Mr. Segal: All right. I think I have given you enough to show you the facts that the Commission thought it had before it. In any event, in reliance on that approval Westinghouse and NBC did affectuate the transfer, and that was done, Judge, on January 22, 1956.

It was in the summer of 1956—and I might as well give the facts, because they will be pertinent in our motion—that the Grand Jury received from the Antitrust Division this entire subject. On December 4, 1956 this suit was brought. I should say that the Grand Jury was still in session at that time. I won't go into the complaint because I think Mr. Hollander has very fairly summarized the issues raised by the complaint.

The Court: You see, I know so little about this field.

87 Mr. Segal: I am afraid you are not alone among the judges here.

The Court: Well, maybe it is just as well. I certainly start with no preconceived ideas about what goes on.

Mr. Segal: The only other date that is significant, Judge,——

The Court: Let me ask you, what is necessary in the way of Governmental consent? Suppose I want to set up a broadcasting station in Harrisburg, for instance. Can I just build it, can I just buy the equipment?

Mr. Segal: No, you must get authority from the Federal Communications Commission.

The Court: Even though I am not affiliated with anybody to start with?

Mr. Segal: That is right. No one can start a radio or TV station in America without a license from the Federal Communications Commission. And of course the number of licenses are limited by——

The Court: And they won't give any of these big fellows more than five.

Mr. Segal: They will give nobody more than five. It doesn't matter whether it is a network or an independent operator, five VHF stations.

88 The Court: Oh, yes, that is right.

Mr. Segal: Westinghouse, for example, is not a network. Westinghouse would be permitted five stations, five TV stations.

The Court: Yes. And these TV stations are where the broadcasts originate?

Mr. Segal: That is right.

The Court: They have their studios and they put on the live shows there and they buy the film and start that off from there?

Mr. Segal: That is correct. And through their transmitter they receive the telecasts of the networks with which they may be affiliated, or from which they may purchase network time.

Now, the only other date——

The Court: Now, for instance—may I just ask again, because it illustrates what I want to know. How, for example, does the Ed Sullivan Show get to Baltimore?

Mr. Segal: That is a network show, and it will come through A.T.&T. telephone lines to Baltimore. It will be piped in through telephone lines to the transmitter

89 and from there it will be broadcast or telecast to the Baltimore people.

The Court: Well, I am only taking Baltimore as an illustration. Who pays whom for that show in Baltimore? Does the Baltimore station, whatever it is, pay the NBC network?

Mr. Segal: Normally the advertiser will be paying for that show, the sponsor, and the revenues which the sponsor pays to the network will be divided between the network and the stations over which the program is shown.

The Court: That is where, for instance, the Baltimore station makes its money?

Mr. Segal: That is correct.

The Court: They get a proportion of the sponsor's——

Mr. Segal: Payment for advertising revenue.

The Court: —payment, which is paid to the network.

Mr. Segal: That is correct.

Mr. Hollander: Your Honor, may I add one thing there. That is where they get their money from network programming. They make a great deal more money, I believe, from independent programs put on locally, or pro-
90 grams that are placed that are called national spot advertising, which are placed perhaps by the same advertisers but not as on a network basis.

Mr. Segal: Except that that will vary with stations, I would agree with Mr. Hollander's statement.

The Court: I want to get an idea of the general operation. If, for example, they have a commentator who is extremely popular and well known in Baltimore but nowhere else, and they want to put him on at 5:00 o'clock Sunday afternoon, the Baltimore station makes all those arrangement, does it?

Mr. Hollander: Yes, sir.

The Court: And they have a sponsor for him who pays them directly?

Mr. Hollander: That is correct, sir. And what I was speaking of when I spoke of national spot, which is a technical term, is where a national advertiser like Lux, or any one of the ones that are on the networks decides, for instance, that he wants to run a movie in a series of markets. He can buy the stations in those markets without going to the network at all. He buys those stations independently.

The Court: I see what you mean.

91 Mr. Hollander: Through what is called a centralized spot advertising representative who is located in the various markets of the country.

The Court: But a station like Baltimore can put on its own shows?

Mr. Hollander: Yes, sir.

The Court: And it has to have a sponsor who is probably interested particularly in selling locally.

Mr. Hollander: Yes, sir.

The Court: Very likely some kind of beer that is popular around there.

Mr. Hollander: Or he might be interested in a national product such as Lux soap. But he figures that his network programs aren't giving him enough coverage on television in that area so he puts additional programs on by placing them through national spot advertising.

Mr. Segal: One thing, in view of your questions, Judge, that ought to be added, and that is—and this is the reason that networks as such are not, as I mentioned earlier programs which are not sponsored that come to an affiliate are not paid for by anybody, they are financed by the network. In other words, a local station does not
92 pay a network for a panel or a public information program which is not sponsored.

The Court: Well, that "Meet the Press" show, nobody sponsors that, do they?

Mr. Hollander: Yes, sir, they do.

Mr. Segal: I think the "Meet the Press" show is well sponsored.

Mr. Hollander: Johns Manville, I believe, and Pan-American Airways.

The Court: I just didn't remember any commercials in connection with that.

Mr. Segal: Take the case when the President of the United States would speak, for example. That would be over the networks and there would be no sponsorship obviously for that.

The Court: All right.

Mr. Segal: Now, on March 8, 1957 (that is the only other significant date) the Grand Jury was discharged and it returned no indictment against either RCA or NBC. So that on December 4, when it was in session, 1956, this suit was brought. On March 8, 1957 it was discharged without returning indictments. I think that gives you, I
93 should think, enough of a preliminary picture of the facts as we see them.

The Court: Oh, yes, certainly.

Mr. Segal: And I think we might now proceed to consideration of Mr. Hollander's Rule 34 motion.

The Court: All right.

Mr. Hollander: Your Honor, if I may just speak for a second, I wonder, there seems to us—and I think there seems to defendants—to be one problem that is pervasive here, and that is a problem that is raised both by certain

of their interrogatories—No. 34, for instance, No. 23(s) and (4)—which would require us to reveal the location of the Grand Jury transcript of the Grand Jury about which Mr. Segal has been speaking. Also, defendants' motion for production would call for that Grand Jury transcript and all documents which the Government got, whether Grand Jury or not, during the course of its investigation.

The Government feels that this is a most serious matter and that it underlies both our objections to part of the interrogatories and also underlies the defendants' motion. I just want to mention this so if you can——

94 The Court: Well, that you gentlemen all feel is the most important issue before me now?

Mr. Hollander: Well, we do.

Mr. Segal: We think it is, too. The only reason that I suggested the other matter was that I think you would get a much better command of what is what as you hear the interrogatories and hear the rule. But I have no feeling about it.

Mr. Hollander: I want to mention one more thing, Mr. Segal. In the defendants' memorandum in support of its motion to produce, which we just received yesterday, there are several innuendoes that the Government has abused the Grand Jury process. I think that ought to be put on the table right now and we should find whether there is a charge that we have abused the Grand Jury process.

Mr. Segal: Where do you find the innuendoes?

Mr. Hollander: Well, there are several of them, Mr. Segal.

Mr. Segal: Why don't you show them to us?

Mr. Hollander: We couldn't help but get that feeling, and we just want to be sure that that isn't the case, because we don't want to argue that if that is the case.

95 Mr. Segal: Let me say this, Mr. Hollander, that except as you go to the whole question, which, as you know, is being vigorously debated everywhere, as to the use of the Grand Jury for what eventuates as and we often think never was regarded as anything but a civil case, we intended no innundoes of any kind. In other words, we don't believe that other than the usual Government policy there was anything done here which was not in accord with the standards that the Depart-

ment has set or that we would criticize. When you get beyond the initial use of the Grand Jury, I know of nothing. And if there is any innuendo in the brief, it is not intentional.

Mr. Hollander: Well, I wasn't meaning to be personal, I just want to be sure, because we feel that ever since the Northern Securities case in 1904 that the Government has been authorized to proceed under this criminal statute, either criminally, civilly or both ways, as Your Honor found in U. S. v. Kohler, and we feel that we are acting for the Government in its capacity as a sovereign in this matter civilly, and we just want to get that laid right on the table.

Mr. Segal: I don't mind saying that to the extent our witnesses have told us about their treatment they were treated very courteously before the Grand Jury,
96 they were afforded an opportunity to tell their story, and I know of nothing which would cause an innuendo as to the way in which this particular investigation was conducted. And I am very glad to say that on the record.

Mr. Hollander: Thank you, Mr. Segal. I wasn't referring to the personal way in which it was handled but whether you felt that our use of the Grand Jury in this civil case was an abuse of the Grand Jury process.

The Court: I think he does. Don't you?

Mr. Segal: Oh, I think that, and especially when as now it develops that you propose to want to use all of the information which was there adduced for the unilateral advantage of one party to a civil lawsuit. I do consider that an improper use of the Grand Jury.

Mr. Hollander: Let me just speak to that. I think you have available in the answers to the interrogatories all the information that was adduced in the Grand Jury. You do not have it in the form in which it was adduced in the Grand Jury, but I think if you look at your answers you will find that you have all the facts the same as we do.

The Court: All right, let's get down to the point. What point do you want to take up first?

97 Mr. Segal: I thought we were going to take up the Government's motion for production under Rule 34.

Mr. Hollander: All right, sir.

Thank you very much for straightening that out.

The Court: The Government's motion.

Mr. Carlson: Your Honor, on the Government's motion for production I might say preliminarily that the picture changed somewhat rapidly. I have been in Denver preparing a case for trial which starts next Monday, and I thought I had all the papers that pertained to this motion for production that we filed. I get into town at 1:30 this morning and Mr. Hollander had left for me an affidavit filed that he received only yesterday. As I understand it it was prepared last Friday.

Mr. Segal: Which is that?

Mr. Carlson: The affidavit of an NBC Assistant Secretary named Shute. It poses some interesting questions. It goes only to NBC, which I take it means that RCA does not oppose the motion in any respect. It also goes only to four sub-paragraphs of the motion, which I might also take to mean that NBC only opposes those four sub-paragraphs.

Mr. Segal: If you want to hear me on that, I might say——

98 The Court: I wish you gentlemen would talk about something that makes sense to me. I am plunged right in the middle of this thing. I don't know anything about these affidavits. As far as I am concerned it is just an argument between you two gentlemen. I wish you would get down to telling me what I have to decide.

Mr. Carlson: Well, we have a very short and I think concise motion to produce that we filed. I will take these up paragraph by paragraph, if you wish, Your Honor, but I wondered if there was no controversy as to most of the paragraphs, I didn't want to go into those and waste Your Honor's time on that.—

The Court: I want to find it in the file, though. You filed it first?

Mr. Hollander: I believe it was filed March 19.

Mr. Segal: It is entitled "Motion For Production of Documents Under Rule 34."

The Court: I have it right here. * * *

Mr. Carlson: Al I was trying to say is that I was trying to save the time of all of us. If there are only four sub-paragraphs that are controverted here, there

99 is no point going into the others.

The Court: All right, sure.

Mr. Segal: I think we have to go through them all. We met with the Government and we said we would like the Government to tell us what they regarded as good cause, and we would be glad to address ourselves one by one to these items. The Government at that time for reasons it regarded as adequate refused to state good cause.

Now, yesterday we received an affidavit in which the Government says as to I think all but one of its requests what it regards as good cause, and in most of them we don't regard it as good cause, so I think the best way would be to start one by one.

The Court: All right. But if you are going to have any common ground, why, then we have to go through it. Go ahead.

Mr. Carlson: The first paragraph of the motion I think we all agree as to what the subject matter is. It involves documents previously produced by NBC and RCA. They were numbered. I feel certain in stating that NBC and RCA know what the numbers mean, what documents they refer to. I know we do.

100 The relevancy of those documents I think is established by the fact that NBC and RCA produced them pursuant to requests that covered generally the subject matter of the lawsuit.

The Court: These are documents which were before the Grand Jury?

Mr. Carlson: They were documents that were produced pursuant to Grand Jury subpoena.

The Court: Yes.

Mr. Segal: We produced those 402 documents, or the copies of them. We gave them to the Government. The Government still has them. We are at a loss to know what it is the Government wants now. We of course don't concede that they are all relevant, but whether relevant or not, the Government has them.

The Court: Is that correct?

Mr. Carlson: The Government has copies that were furnished pursuant to agreement between the parties.

The Court: Well, then, what do you want?

Mr. Carlson: We just want permission to use these copies in this lawsuit. It is as simple as that.

The Court: Well, you have them. It is even simpler than that. You have them, and when it comes to the
101 lawsuit, when you produce them to use them, why, then I have to rule on it. But there is certainly no use of ruling that they are required to produce something that you already have.

Mr. Carlson: Well, we were attempting to establish the right of the Government to use the documents in this lawsuit.

The Court: Oh, I don't believe this is the time to do it. I mean, you are compelled to produce loads of things, a person is, that they can't offer in evidence.

Mr. Carlson: I don't mean that, Your Honor. I only mean that we shall have them in our possession as a result of civil process.

The Court: Well, you have them in your possession anyhow. I don't see that it is necessary for me to rule on that at all. When you come to the trial of the case you offer them. They agree that they are authentic copies,——

Mr. Segal: Certainly.

The Court: —and that is all there is to it. At that time we determine whether they are relevant to the case.

Mr. Carlson: I don't see that we have any further
102 cause to discuss that.

The Court: No, there is nothing to argue about on that matter. It doesn't require any ruling.

Mr. Carlson: The second paragraph refers to a specific document. I might call it the Denny-Cott memorandum which we learned existed. We have been informed that there is such a memorandum and we drafted a specific paragraph to obtain its production. I think as to subject matter we also have some knowledge of that.

I think the demand for production itself is sufficiently explanatory of what the document purports to contain to establish good cause for its production.

Mr. Segal: Well, they haven't shown any relevancy whatever on that, but entirely apart from that and forgetting for a moment that this precedes the date on which they say the conspiracy began, they say beginning about 1954. This is dated February, 1953. In addition, it is a document of about 30 pages, of which I think four and a half pages relate to the subject matter of the inquiry even as set out in this Rule.

The Court: Well, I think it should be produced so far as it relates to the subject matter stated in the Rule. I don't know how to separate it.

103 Mr. Segal: We can separate it easily enough.

The Court: I will order that done. I don't know whether the Government will be satisfied with your allocation of it, but if not——

Mr. Carlson: I don't understand any reason for withholding part of the document.

The Court: Well, if it has nothing to do with it it might give information that they don't want given, and they are not required to, I don't think.

Mr. Segal: They have specifically stated here, Judge, what they want.

The Court: Yes, that is right.

Mr. Segal: They want the portion of the document which deals with certain matters. If you order it, that we will give them.

The Court: Sure, I will order that. If we are satisfied that that is all there is in there that is relevant to this case.

Mr. Carlson: I haven't heard any claim by Mr. Segal that there is something confidential or otherwise privileged in there.

The Court: I don't know that it is otherwise privileged. He just says it is totally irrelevant.

104 Mr. Segal: It has nothing to do with the subject of your inquiry.

Mr. Carlson: What it is in context is very difficult to tell unless the memorandum is seen.

The Court: Well, it may or may not be. I don't know.

Mr. Segal: Why don't we supply the portion which meets their motion and then if they have a complaint we will just have to come back.

The Court: Yes. All right, do it that way. I don't want to have to read that thing through myself to determine what is relevant and what isn't.

Mr. Segal: I will do that, Judge, personally.

Mr. Carlson: I might state that the Government would also like to do that, Your Honor. We would like to read the whole memorandum in context and see what is involved.

The Court: I know that. That is what you want, but that is what the issue is here, whether you are entitled to the whole think if it has nothing to do with it. If he talks about a trip that he has taken or is going to take to South America, why it would be so obviously irrelevant and may involve his private plans. You know those things
105 might be. If you can do it without embarrassment or without disclosure of confidential matter I don't see why you should stand on the question of relevancy.

Mr. Segal: Judge, if there is any part of it which remotely affects the pages that I have referred to, we will supply that. We won't cut it down sharply. But there are parts of it that just simply have absolutely nothing to do with what they are asking.

The Court: Even so, what if it is? What if it is a description of a pleasant time he had on a Mediterranean cruise?

Mr. Segal: Frankly, Judge, I don't know what it is. I will have to read it.

The Court: Well, suppose it is. What harm would it do?

Mr. Segal: Suppose it has confidential matter in it?

The Court: That is a different thing. Go into it and see. If you can give him the whole thing, give it to him and don't hold back merely because it is irrelevant. If there is a good reason to hold some of it back you will have to come back here and thrash it out.

Mr. Segal: All right.

106 The Court: I don't see that it makes any difference if it is irrelevant.

Mr. Carlson: Paragraph 3 is similar in context to the so-called Denny-Cott memorandum referred to in 2, and this came about by the fact that counsel for RCA and NBC produced subsequent to——

The Court: Why aren't these relevant? These you can't separate.

Mr. Segal: No. Apart from that, here, as Mr. Hollander says, the charges are rather simple. They are contained in I think four or five paragraphs. They charge that beginning about 1954 RCA and NBC engaged in a conspiracy to get five of the eight primary markets. Now they have an inquiry asking us to go way back in a vast number of files, which of course involves carloads of

drawers—we have an affidavit on the general filing system, and so on—way back to 1946, more than eight years before the allegation of the conspiracy——

The Court: Well, now, wait a minute. I didn't read that correctly. I made a mistake.

Mr. Segal: —began, right down to the present time. It doesn't simply involve the five or eight primary markets, it involves the whole United States, and it is just
107 one of these dragnet things which parties ask for, but which is clearly not proper under a Rule 34 motion.

The Court: All right, let me read it. I didn't read it correctly.

The only question there is how much harassment there is involved in the thing.

Mr. Carlson: Your Honor, I was about to explain the reason that this was cast in this form, and that it goes back to the date it does. I had said that subsequent to the Grand Jury proceedings NBC and RCA counsel produced a memorandum which indicates that this conspiracy that we charge may have existed before the initial date we charged in the complaint, and we didn't know about it at the time. So that in order to find out how the conspiracy came about——

The Court: That is all right, I understand your point of view and I think it is all right. I don't think you have to cut it off at the date you allege the conspiracy began, because there are all kinds of circumstances that might be leading up to it. But that isn't the thing I was questioning. I am just questioning whether there isn't so much of this stuff that you impose an almost intolerable burden on the defendants' Isn't there some way of cutting it down?

108 Mr. Segal: We get down to a point where the estimates are thousands of man hours. You see, Judge, there is no central filing system. We have got to get a picture of what happens here. They have a New York office where they have New York files scattered through a very large building in which NBC offices are located. Then they have their dead files in a central file room in a storage warehouse. Now, every one of the owned and operated stations has its own filing system in various parts of the country. They blandly in one after

another of these questions say Go back to every file—in one case for 30-some years, I think—and see whether there is a memorandum or a letter or a statement or anything pertaining to a given subject.

Well, it is just one of those completely impossible requests physically.

The Court: That is the only thing that bothers me about it.

Mr. Segal: And that is going to run all through here.

The Court: ". . . which deal with the status of all NBC's owned and operated stations division, and compare the markets in which NBC's stations were or are located with those markets served by stations
109 owned and operated by the American Broadcasting Company and/or Columbia Broadcasting System."

Mr. Segal: They ask for that for a number of years.

Mr. Carlson: The subject matter is very limited, Your Honor.

The Court: Yes, it is quite limited.

Mr. Carlson: Mr. Segal suggests something. Possibly I am not familiar with NBC's and RCA's filing systems, and I am still not familiar after reading the affidavit, but it might be that we can devise an issue on limitation. He talks about the New York office and this talks about NBC or RCA officials.

The Court: Yes, it does seem to me that actually what is involved is an awful lot of research to find a comparatively limited amount of information.

Mr. Carlson: Because of the subject matter we have to assume in this kind of a request that it will be in only a very few places. I, not being familiar with NBC's and RCA's files, cannot make any other assumption to start with.

The Court: Well, as I say, the matter they seek to produce is probably relevant.

110 Mr. Segal: May I just address myself to the date, Judge? I know that judges don't cut off plaintiffs to a given date, but here you have a pretty narrow issue. Here it is charged that a given agreement is in violation of the antitrust laws, which agreement was entered into in 1955.

The Court: Well, yes, let's be reasonable about that, too. How far back of 1955 is it fair to assume that these concerns were thinking of doing what they are charged with doing, or even considering it?

Mr. Carlson: The reason we selected January 1, 1946 is because we thought that this might go back to the time that NBC got into the television business, in effect, in 1946.

The Court: I think that is doubtful.

Mr. Carlson: But the date from which our information goes is about 1951.

The Court: Well, all right, I will limit it to 1951.

Mr. Segal: May we ask what '51 is? I don't recognize any significance in that period.

Mr. Carlson: My recollection is—

The Court: Well, I think that is possible, I mean,
111 without going into it, I think that is a fairly reasonable time to go back to.

I will order that mtater produced, fixing the date of 1951, subject to two things. First, if you can make some limitation of it which will reduce the number of man hours necessary to produce it to some extent, that would be desirable to do. If you can't, and I can be convinced that the thing amounts to an impossible degree of harassment, then I will have to reconsider my order, at least make a reappraisal of the situation.

Mr. Segal: Is he willing to limit that to the top echelon of people in New York?

The Court: I don't know. That is between you two.

Mr. Carlson: Yes, I think we would be willing to do that on Mr. Segal's say-so as to who would be involved in this, and then no further search need be made beyond those particular offices. We are perfectly agreeable to that.

The Court: That is not unreasonable.

Tentatively, I will make that order, then, limiting it to 1951.

Mr. Segal: There is one thing. I assume that
112 would run to the date of the filing of the complaint.

The Court: Yes, I suppose so.

All right.

(Discussion off the record.)

113 The Court: All right, now we are down to No. 4.

Mr. Hollander: Your Honor, if Mr. Segal is agreeable, I want to make sure we understand each other on that very first item. What we wanted, sir, and asked in the stipulation for, was merely an agreement by defendants that these documents were copies of originals from the files of either RCA or NBC, and——

The Court: They certainly agree to that.

Mr. Segal: That is correct.

Mr. Hollander: And that they were kept in the ordinary course of business and that they would not object because they were not original documents.

The Court: They will certainly agree to that.

Mr. Segal: That is correct.

Mr. Hollander: Now, we want to make sure that we settle, if we can today, all the questions involving the Grand Jury. We felt they might raise an objection at the time we tried to introduce them, that these were improper and invalid because they were obtained in the course of Grand Jury investigation, and we thought if we could settle that today——

The Court: That is another matter. If you want to settle that I don't care, but that is not involved in this motion to produce.

Mr. Hollander: That, sir, is why we asked for

114 the documents.

The Court: But I don't think it is involved in the motion to produce. It can be settled, there is no objection to settling it if you can, but you don't need any ruling on that motion to produce in view of Mr. Segal's agreement that they are authentic copies.

Now, let's go to 4.

Mr. Segal: You said "properly authenticated"?

The Court: Yes.

Mr. Carlson: Paragraph 4 again asks for one specific document, which is a rate review report, and this as we understand it from our information is the first such report prepared after National Broadcasting Company began operations of the station in Philadelphia which it took over from Westinghouse.

The Court: Is there objection to this request?

Mr. Segal: I want to make clear, I think it is neither relevant nor material. It has been produced in another

proceeding. It is available to the Government. If they want another copy I suppose we will give it to them.

The Court: All right.

Mr. Carlson: They is no objection to that.

The Court: No objection.

Mr. Carlson: Going to paragraph 5(a)——

115 The Court: Do you object to all of this paragraph 5?

Mr. Segal: Oh, yes. All of RCA and all of NBC could make a career of getting what they ask in these paragraphs.

The Court: All right.

Mr. Segal: For the next many months.

The Court: That is a question that will have to be determined.

Mr. Carlson: Involved in the Government's charge is the use by NBC of its network power to gain stations in five of the eight primary markets. After we had obtained the document I referred to earlier, that is, a memorandum by one of the NBC vice-presidents, which indicated that this conspiracy may have had background or existence as far back as 1951, we deemed it essential to find out if there was a conspiracy at that time whether steps were taken to effectuate it prior to the date that we charged by acquisition or negotiations for acquisition of television stations in that interim period. The first subparagraph of paragraph 5 of our motion was designed to obtain just such documents.

Mr. Segal: You see, they start by asking for: "All documents and other writings or recordings of every kind . . . which are in the possession or control of NBC, its officers, directors, agents, representatives or em-

116 ployees, and which were prepared, sent or received . . . which relate to: . . ."

Now, to go back, here again they say the date of service of the motion. I guess on all this we can agree that certainly it is not proper beyond the date of the filing of the complaint.

The Court: Yes.

Mr. Segal: Except for that, we have to go back five years in going through these vast number of drawers just to be sure that there isn't some document, some writing, some letter, some memorandum which somebody wrote to

somebody saying, "Wouldn't it be nice if we also ran a station in Squeedunk?"

Now, when you are all finished it really doesn't give them anything, because, Judge, they say five out of eight primary markets. That is really what the Government is interested in. They know very well that NBC isn't seeking to go into market No. 30 anywhere, and if five years ago somebody having a station in market 30 wrote a letter to somebody in NBC saying, "Would you like to buy our station?" And NBC replied saying "No," the Government isn't interested in that. But to find out whether that letter exists is a vast undertaking.

The Court: Well, how can we meet that situation?

117 Mr. Carlson: I think that overstates the case a little bit, because NBC if it is like most companies that I have heard of doesn't buy television stations down in the bottom of its staff some place or through some employee who handles equipment. That is a top level management decision and there again——

Mr. Segal: If you want to limit it to the decision, that wouldn't be a problem.

Mr. Carlson: I haven't said that.

Mr. Segal: But anybody who works for a station can get a letter from a friend somewhere saying, "Do you think your company would be interested in buying my station?" A stenographer can get that.

Mr. Carlson: That is correct.

To finish my thought, I was going to say that here again if we had any reasonable way of knowing who the particular officers were that would be involved in such a matter, we would have no objection to an echelon limitation.

The Court: Yes. Can't you work that out?

(Discussion off the record.)

(Recess, 1:00 o'clock until 2:00 o'clock P. M.)

118 AFTER RECESS

PRESENT: Mr. Maher, Mr. Hollander, Mr. Carlson.

Mr. Segal, Mr. Mullinix, Mr. McKay, Mr. McInerney.

VICTOR KRAMER, ESQ., (Department of Justice).

Mr. Segal: While you were out, Judge, we met and I think we accomplished a good deal. We think we are able to enter in formal stipulations as to all of the remaining points, subject to the fact that each party I think would like to regard it as not conclusive.

The Court: You mean at the present time.

Mr. Segal: At the present time. If the Government should find that what it gets is not what it bargained for it could come back. If we found that it proved to be more onerous or for any other reason that what we said we would produce should not be produced, we could
119 come back.

The Court: All right.

Mr. Segal: Subject to that reservation by both sides, I will try to state informally what we have come to, unless Mr. Hollander would like to.

Mr. Hollander: No, go right ahead.

Mr. Segal: In the first place, we have agreed as to 5 generally that, except where I shall point out a different procedure, the obligation of the defendants shall be to explore the subject only with such members of the top echelon who could reasonably be expected to have the information to which reference is made. We will exercise that liberally in trying to reach all people who would be reasonably expected to have any access to any of the materials in question.

Now, as to 5(a), it has been agreed that the question shall be restricted to documents pertaining to such possible acquisition or such negotiations for acquisition as were seriously offered or seriously carried on, respectively, or, in any event, as were seriously considered.

I think that fairly states the matter, does it not?

Mr. Hollander: One thing there, we did not de-
120 termine whether the date of service would apply.

Do you recall that is the one question where we might want to extend it beyond that.

Mr. Segal: As to the date, we agreed tentatively as to all of these that the date would run to the date of the complaint, with the possible further consideration of (a), and that, too, being subject to any further consideration that the Government might want to give to a pinpointed situation which might develop after it got the information.

As to (a), it was our feeling that that ought to be subject to the same restriction and to the same question of reopening if it didn't give the Government what it wanted. However, there was some discussion that we would come back to that, and we failed to do so, as Mr. Hollander indicates.

The Court: What is the distinction?

Mr. Segal: The distinction is the date of the filing of the complaint as opposed to the date of the service of the motion.

The Court: What is the distinction between (a) and the others on which you have agreed? Why should (a) run to the date of service of the motion and the others to the date of the complaint?

120a Mr. Hollander: Your Honor, for this reason. We charge a conspiracy to obtain two stations in five of the eight primary markets. NBC had as of the time of the complaint only obtained one. Therefore, we feel that until we know otherwise the conspiracy is still in existence and they still have the Washington station which they wish to get rid of.

The Court: Do you want a ruling on it or are you satisfied to let it go the way it is?

Mr. Segal: Well, we are in another connection going to give them the present status of our situation with Westinghouse, which will give them that precise fact in so far as what has happened.

Mr. Hollander: No, I don't think so, Mr. Segal. We allege, as you know, that you tried to obtain unlawfully additional VHF stations in the eight primary markets other than the one involving the Westinghouse station, and since Washington has not been disposed of and that was one of the initial objects of the conspiracy, in our opinion, the alleged conspiracy, we therefore would like to leave that date open, because there is no way we would know whether documents exist after the date of the complaint unless you told us.

Mr. McKay: With respect to the Washington sta-
121 tion, or is this general?

Mr. Hollander: Well, NBC getting rid of the Washington station either by sale or exchange for some other station.

Mr. Segal: We certainly think at this stage that the date of the filing of the complaint ought to be a cutoff for discovery, unless or until something further develops. I think probably we need your ruling on that, Judge.

The Court: I will sustain Mr. Hollander's point on that.

Mr. Segal: Now, on (b), it has been agreed to restrict (b) as follows: It is generally believed among the attorneys for both parties that a change in the call letters occurred in 1954. Subject to that being the correct date——

The Court: What do you mean by "the call letters"? Do you mean the names of stations?

Mr. Segal: The names of the stations to include the "RC" of RCA or to include in New York "RCA."

Assuming that is the correct date, it has been agreed that we would supply the documents and the writings covering the period in which that subject was under active discussion.

122 I think that fairly states it. I might say, just to develop it, that we had thought perhaps a year. Mr. Carlson had thought a year might be either too restrictive or not restrictive enough, and we had hit upon this other solution, leaving it that if it extended beyond the year in which the subject was under discussion before or after, it would cover the total period in which the change in question was under active discussion.

The Court: Yes, all right. Is that properly stated?

Mr. Carlson: Yes. I would like to say further that we also agreed that in the event documents were found within this general period which referred to earlier documents, that those referred to documents would also be produced.

Mr. Segal: Yes, that is correct.

The Court: Very well.

Mr. Segal: Now, on (c), so far as we representing the defendants know, a program called "Monitor," appearing on the radio network, is the only instance covered by that item. We will check if that is the only instance, and if so we will produce the information requested covering "Mon-

itor" and with the same proviso as to the period for which the investigation will be made.

The Court: That (c) means that they sell the
123 time on all their stations at once?

Mr. Segal: As a group.

The Court: At one time, yes.

Mr. Segal: That is all of their owned and operated stations.

(Discussion off the record.)

Mr. Segal: As to (d), the Government believes that there are two principal incidents in which it is interested, one occurring around January 1, 1949, involving radio stations, and the other occurring in 1953 or 1954, involving television stations. We are to check those dates, and assuming that they are correct, as to the 1949 incident we are to restrict the documents or other items in the same way as we did under (b), and which elliptically I will refer to as the period in which the subject was under active discussion. As to the 1953 or '54 incident, it is subject to the same restriction, plus the extension that we will carry it to the date of the filing of the complaint.

As to (e), we will treat that as though that in an interrogatory, and we will give the present affiliation status of the Westinghouse Broadcasting Company's television stations with NBC.

(f) is to be restricted to the period from February 1953 to the date of the complaint.

124 Now, as to 6, as the affidavit shows, the material to make the comparisons in which the Government is interested is not available in any form which would make it practicable for either side, as now appears. We are going to undertake to see whether there exists records for any sample weeks which will provide comparisons. The Government attorneys have inquired whether for internal purposes or otherwise there weren't sample week comparisons at sometime or other kept by RCA or NBC.

The Court: That is a comparison of the amount of time spent?

Mr. Segal: A comparison of the amount of network time on our station compared with NBC; a comparison of the color and black and white, and the other comparisons implicit in 6.

Is this a fair statement, Mr. Hollander?

Mr. Hollander: Yes, sir. You left out the word "affiliate;" ". . . compared with NBC affiliate."

Mr. Segal: "Affiliate," yes.

Now, if such sample weeks do exist, we will give the documents or other records reflecting that to the Government. That applies to 6(a), (b), (c), and (d).

As to (e), we have advised the Government that there is no such document as that described other than one
125 which is attached to the application which was filed with the Federal Communications Commission. Since the Government has a copy of that application, and, therefore, of that document, that would seem to terminate the matter as far as it goes.

Everything I have said with respect to NBC applies also with respect to RCA.

Does that reflect our understanding?

Mr. Hollander: I believe it does.

The Court: What is RCA's part in this conspiracy, the charge?

Mr. Segal: RCA is charged with having conspired with its wholly-owned subsidiary to aid it in acquiring five of the eight primary markets.

The Court: Which is its wholly-owned subsidiary?

Mr. Segal: NBC is its wholly-owned subsidiary. They are the two alleged conspirators.

The Court: So when you say NBC, you practically say RCA, too?

Mr. Segal: That is the position we take.

The Court: Yes, all right.

Mr. Segal: For purposes of this discovery motion. However, the—well, strike what I said, "That is
126 the position we take."

The Court: All right, what is the next matter?

Mr. Segal: All that I meant to say is that every commitment we have made to go into the NBC files also applies to going into the RCA files.

The Court: Yes.

Mr. Segal: Now we get to the objections to our interrogatories.

The Court: Yes, I think we ought to take that next.

Mr. Hollander: Your Honor, I think it would be well if we just started with the individual objections, if that is

satisfactory to you, until we get to what we consider as the pervasive objection that goes not only to the interrogatories, as I mentioned, but also to the defendants' motion to produce, and then I would like to handle that a little more formally, if I may.

The Court: Whose interrogatories are we talking about, the Government's?

Mr. Mullinix: The defendants'.

Mr. Segal: They are the defendants' and the Government's objections.

The Court: Oh, yes, plaintiff's objections to defendants'.

127 Mr. Hollander: Let me preface this, Your Honor, by stating that at the meeting between counsel for NBC and RCA and for the Government, to which Mr. Segal referred, we worked out a lot of agreements concerning objections that we had previously made, so that the only ones, with your permission, I will refer to are the objections to the interrogatories which still subsist and which we have not answered.

The first of those is Interrogatory No. 15(g) and (1) which Mr. Carlson is going to discuss.

The Court: (d), (c) and (e) have been answered?

Mr. Hollander: Yes, sir.

Your Honor, would it help, here is a copy of the answers, if you would like to have those in front of you.

The Court: Yes. Are these just the answers?

Mr. Hollander: Yes, sir.

The Court: All right. Now, what are we on 15?

Mr. Hollander: 15, sir.

Mr. Carlson: These will generally go to a specific paragraph in the complaint. I think, however, that reference to the complaint appears in the introduction to
128 each interrogatory.

The Court: What page do I want in your answers?

Mr. Carlson: The interrogatory is on Pape 14.

Mr. Segal: I don't think having the answers will help you at all, Judge. That will only confuse you.

Mr. Hollander: Here is another copy of the interrogatories.

Mr. Segal: That will help the judge more.

The Court: It won't confuse me, but I want to see it. Here is 15, yes, all right.

Mr. Hollander: Your Honor, would you like a copy of the interrogatories?

The Court: What are you down to, (g)?

Mr. Carlson: 15(g) starts at the bottom of Page 14 and requests "The specific part or parts of such agreement . . ."

I don't think you will find any reference to this in our answers, Your Honor.

The Court: I know it. Now look, I want to look at the answers. Won't you let me?

Mr. Carlson: Why, of course, I will be happy to.

129 The Court: All I want to do is to look at the answers.

All right, go ahead now.

What I wanted to find out, the parties have been treating these as a request for a bill of particulars, really, more than just interrogatories. You are asking for a bill of particulars. That is what the answers to these interrogatories amount to, isn't that so?

Mr. Segal: To some extent. We are trying to find out just what the Government's position is so we can address ourselves to it.

The Court: Yes, You are not really asking them for information as to facts.

Mr. Segal: We are asking a good many of them as to facts.

The Court: Yes, but a lot of them aren't; a lot of them are just asking——

Mr. Segal: What their position is.

The Court: Yes, what they think about this or that.

It is all right, I have no objection to it. That is why I want to look at the answers. I thought that you were treating them probably as a bill of particulars.

Mr. Segal: Some of them we are endeavoring to

130 explore just what their claim is.

The Court: Yes. That is a bill of particulars. That strictly speaking is not an interrogatory.

Well, go ahead.

Mr. Carlson: As you probably guessed, we tried to answer everything we could here. The ones that we just couldn't get over we made specific objections to. The first one of these is (g), which asks for:

"The specific part or parts of such agreement which plaintiff claims to have been in unreasonable restraint of trade, quoting each verbatim."

Now, that refers to Paragraphs 18 and 19 of the complaint, charging unlawful combination or conspiracy. It is our belief that this calls for a legal decision as to each part of the combination or conspiracy that is illegal, and it is also our view of the law that a combination or conspiracy is to be viewed as a whole and that it would serve no useful purpose whatsoever to give a legal opinion as to the illegality of part of a combination or conspiracy.

Mr. Segal: Well, here, as Mr. Hollander said at the outset, we have a pretty narrow issue, and we are very frankly puzzled. We have two things they attack. One is a specific agreement made between two parties,
131 Westinghouse and NBC, allegedly on some theory of coercion, although Westinghouse is twice as big as NBC. The other is some sort of an agreement or understanding between——

The Court: You say Westinghouse is bigger than NBC?

Mr. Mullinix: RCA.

Mr. Segal: Two and a half times as big as RCA, the parent of NBC.

The Court: Oh, yes.

What does Westinghouse own besides the station here?

Mr. Segal: They have very large manufacturing plants.

The Court: Oh, it is the big——

Mr. Segal: It is the big Westinghouse which also owns Westinghouse Broadcasting Company.

The Court: Oh, of course it is. Sure. I thought maybe it was a separate company.

Mr. Segal: No.

Now, the second thing is that RCA is alleged to have some continuing agreements with its own wholly-owned subsidiary. We think if we are ever going to get anywhere here it is perfectly proper to say to them, "Well, what parts of the agreement do you people claim to be
132 in unreasonable restraint of trade?" If we don't know that we just have no point of embarkation to arrive at a defense.

The Court: I don't believe you can, Bernie. I think it asks entirely too much. I mean, they allege these two

agreements were in restraint of trade and they constituted a conspiracy. Isn't that the fact?

Mr. Carlson: Yes. We allege a combination or conspiracy and a contract.

The Court: And these agreements were the agreements that effectuated it. I think if you cut them up into small pieces you are going to have an awful lot of trouble later on.

I will sustain the Government's position on that. The whole agreement, the Court will have to determine that. I don't believe you are going to gain much by that.

All right, let's go on.

Mr. Carlson: The next one is 15(1), which appears at the bottom of Page 16. That asks whether plaintiff claims that the acts allegedly performed by NBC at paragraphs 20 and 21 of the complaint were unlawful because of the alleged combination or conspiracy——

The Court: Wait a minute until I get it. Page 16?

133 (Discussion off the record.)

Mr. Segal: I just want to say on the other, you see, some of these things we have asked admittedly are the kind of things that I suppose will have to be decided in a pretrial conference anyway.

The Court: Yes, I think probably some of them will.

Mr. Segal: We thought this might have anticipated it and help us all. That was the reason we asked that question.

The Court: But I think it is a little early to say, and I think on the face of it the Government's objection is sound.

Now, 15(1).

Mr. Segal: Well, here we would like to know whether they take the position that a mere exchange of a station between Westinghouse and NBC is unlawful, even though approved by the FCC, or whether they take the position that it is because RCA allegedly conspired with NBC, that that is illegal.

If we don't know that, how do you proceed with anything? To what do you direct your pretrial discovery?

The Court: I don't quite get what you mean. An

134 exchange. It has to be an agreement, doesn't it?

And if it is illegal it has to be a conspiracy. Aren't the two things the same?

Mr. Segal: No.

The Court: You can't exchange without an agreement to exchange and you can't make an unlawful agreement without entering into a conspiracy.

Mr. Segal: But you see their "unlawful agreement" between RCA and NBC is different from merely this exchange agreement. There the unlawful agreement or concerted action is an alleged attempt by the two of them to get five out of the eight primary markets, not simply this exchange.

Now, we ask do they take the position that the agreement is unlawful of itself? Do they take the position that a parent and a sub can't pursue a joint interest? Or do they say that there is an illegal combination or conspiracy which taints the relationship or taints the exchange?

The Court: It is a pretty hairline distinction. I have difficulty grasping it.

Mr. Segal: Our difficulty is we think it is a kind of hairline case, frankly.

135 The Court: You know a lot more about the law in this case than I do. The Government's allegation, as I understand it, is that the acquisition itself was illegal. Or do you say it is only illegal because it was the result of a conspiracy between RCA and NBC?

Mr. Carlson: I think both of your statements are correct. There are in essence two charges. One is a combination or conspiracy between NBC and RCA to acquire television stations in certain markets.

The Court: And that you say is illegal, even if they had not acquired any?

Mr. Carlson: Yes, that is correct.

The Court: All right.

Mr. Carlson: The other is a contract by which a television station, WPTZ, was acquired, and we charge that is a contract in restraint of trade.

Now, what else do you want to know?

Mr. Segal: As to the latter, we say, "Do you charge that that is a contract in restraint of trade merely because Westinghouse and NBC could not legally agree on that exchange, or because there was coercion?"

The Court: In other words, the question is if there had not been any RCA in existence and NBC had acquired

that, would it have been a contract in restraint of
136 trade.

Mr. Segal: That is right.

The Court: Well, that could be answered easily enough.

Mr. Mullinix: That is all we are asking.

The Court: Yes. Is that your position?

Mr. Carlson: That is not what the question asks.

The Court: All right. But it is cleared up now. That is what he wants to know. He wants to know if there had been no such thing as RCA and then NBC had been acting independently, would the Government contend that its acquisition of this other station, or this exchange, or whatever it did, was, under the circumstances of the case, eliminating RCA as a factor, an illegal contract in restraint of trade.

Mr. Carlson: I can answer that now. The answer is yes.

The Court: All right, there you have it.

Mr. Segal: That is what I wanted to know. That is what we were trying to learn.

The Court: I don't know, Bernie. You weren't quite as clear as you sometimes are. I couldn't get it through my head, I will say frankly.

137 Mr. Segal: I think the discussion clarified my own thinking, Judge.

Mr. Carlson: Next would be 22(i). I might say that by agreement between the parties we amended this interrogatory to clear up what we all considered one ambiguity, but the Government's objection remained, that it still was an indefinite and ambiguous interrogatory because it asked for the information with no time limit and no subject matter limit, and we were just unable to tell——

(The interrogatory was read by the Court.)

The Court: All right, now, what is the objection?

Mr. Carlson: We claim that it was ambiguous and indefinite, and this is against the background of (h) above, which asks for the details in a specific manner, which they have answered.

The Court: You have answered (h)?

Mr. Carlson: Yes. Now, (i) would ask for, as we understand it—and as we think the plain language says—production of a conversation between Mr. Hollander and

myself concerning any of this subject matter here, whenever it occurred, even if it only occurred yesterday.

Mr. Mullinix: We certainly had no such intention as that, Judge, and this is the first that we have heard
138 that the Government was reading it that way.

Mr. Carlson: That was exactly the contention.

Mr. Mullinix: This asks simply for operative facts concerning the acquisition and its negotiation, each incident concerning that acquisition of which the Government has knowledge.

Mr. Carlson: I think we informed you, Mr. Mullinix, that we considered it vague and indefinite even as amended, in that it couldn't be tied down to any particular subject matter.

Mr. Segal: This (i) we had agreed to insert the words "Westinghouse Broadcasting Company's Philadelphia stations" before the words "a Philadelphia station."

The Court: Now, what do you mean by "the time and place"? Time and place of what?

Mr. Mullinix: Of the incident, of each incident of which the Government has knowledge, which is specifically referable to its Paragraph 21 of its complaint, which begins "On or about May 16, 1955, defendant NBC entered into a contract with WBC in unreasonable restraint . . ."

We ask them for the information they have supporting that averment of the complaint. Now, if they have any other ambiguity we will clarify that. To the extent they think it is asking for their mental processes, or
139 the work product of Mr. Hollander or Mr. Carlson, we don't want that. We are not asking for it.

The Court: Well, does that clarify it sufficiently?

Mr. Carlson: I think the key word here probably is "incidents." What an incident is I don't know and I have no way of telling from the interrogatory.

The Court: What do you mean by "each incident"?

Mr. Mullinix: Each occurrence in the course of the negotiation of this transaction.

Mr. Segal: Of which they have knowledge.

Mr. Mullinix: Of which they have knowledge, obviously.

Now, I think everybody in this case knows when this negotiation started and when it ended. It is a very clearly defined time period in everybody's mind. We are simply

asking the Government to catalogue the information which they have as to the incidents building up to and resulting in the effectuation of the agreement for the exchange.

Mr. Carlson: I don't know how that is different from (h).

Mr. Mullinix: (h) relates only to the consideration.

140 The Court: I know, but he is raising the question of the word "incident." If a man gets on the train to go to New York, is that an incident? If he expects to meet somebody? Where are you going to draw the line? If he expects to meet somebody in connection with these negotiations, is his getting on the train an incident or is his getting his lunch in New York an incident?

Mr. Mullinix: I don't think it is an incident, Judge, until they get to the point where they sit down and discuss what is going on.

The Court: I mean, that is what they are afraid of, that they will fail to give you some information which you will say is an incident and which they don't think is an incident.

Isn't that so? Isn't that your proposition?

Mr. Carlson: That is right.

The Court: You can see where there is some difficulty there. If you could define that word a little bit more it would be all right. The question is right enough.

Mr. McKay: It is each material incident.

Mr. Mullinix: Each material incident or each material event.

141 The Court: Why couldn't you make it each conversation or each meeting or each——

Mr. Segal: With respect to each conversation, meeting, correspondence, memorandum or other written document.

The Court: Yes, all right, something like that. I think that would give you what you want, wouldn't it?

Mr. Carlson: I think we have already given them that, but we certainly would be willing to re-examine to see if there is anything that might fall into that category.

The Court: All right, then reform that in line with what you said. It is all right as it stands.

Mr. Mullinix: I think it is all right as it stands in the record.

Mr. Segal: Yes, I think so.

The Court: All right, the defendant agrees to reform the interrogatory as stated by Mr. Segal.

Mr. Carlson: Excuse me, Your Honor, I think, too, that there should be some date limitation here.

The Court: Oh, I don't believe that is necessary, because it was a very definite——

Mr. Segal: It relates to a specific contract.

142 The Court: A specific contract, yes. I don't think it makes any difference. I think that is all right. I won't limit that.

Mr. Carlson: The next one is at the top of the next page in your set there, I believe, Your Honor, 22(k). We object to this on the ground——

Mr. Segal: May I interrupt to say that I think that has been largely answered by the statement made in response to 15(1), except in so far as this interrogatory asks the plaintiff to state the additional facts, in the fourth line. I think the statement of the claim of the Government has been stated in answer to Your Honor's questions earlier, so that what is left here is the statement of additional facts which the plaintiff claims render the exchange illegal.

Mr. Carlson: I don't follow you at all, Mr. Segal.

The Court: He thinks that the answer as to what you claim to be illegal has already been given.

"State whether plaintiff claims that the exchange of local markets . . ."

It sounds like the same question.

Mr. Segal: I think it has been answered, Judge.

The Court: All right, then we will go further.

143 Defendant will not require an answer to Interrogatory 22(k).

Mr. Hollander: Your Honor, the next objection is an objection to Interrogatory No. 23. We first have an over-all objection to this interrogatory, Your Honor, because almost every question in it includes some word like "approval" or "authorization" or something of the sort referring to the Federal Communications Commission approval or consent to the exchange of licenses between these two stations, and we feel that "approval" and "authorization" mean different things to different people. We contend that the Commission had no right to approve it in

the sense that defendants may be using it here, and therefor we think we are in a box no matter which way we answer it. That was our over-all objection to that question, Your Honor.

Now, we have individual objections to the various parts of this question, as you will see on Page 8 of our written objections.

The Court: You mean (c), (d), (k), (l)?

Mr. Hollander: Yes, sir, practically every subdivision of this interrogatory.

The Court: Well, let's work it out as we go along.

Now, what is this question about approval and
144 authorization?

Mr. Hollander: The first subdivision, Your Honor, says: "Whether both WBC and NBC requested FCC approval of the exchange before consummating it."

Now, we have no objection to giving any facts or information that we can, Your Honor, but we don't want to imply by our answer that we think the FCC had the power to approve this transaction in the sense that it will be used here.

The Court: I don't think you would. They asked them to do it. If they haven't the power to do it I don't think you are bound by saying, "Yes, they did ask for approval" period. I can't see how it binds you in any way or limits you.

Mr. McKay: Counsel could make an appropriate reservation in their answer.

The Court: Yes, sure.

Mr. Hollander: That would apply only to a few of these, in any case.

The Court: Well, that wouldn't bother me a bit, because if they asked whether a man came down to the court and asked for a judgment of a million dollars, it is no admission that the court could give a man a judgment of a million dollars. Oh, sure, I think that is all right.

145 I don't know what the technical word is. What do they call it when they do it? Do they call it "approval" or "authorization"?

Mr. Hollander: Well, I think either one is proper in the context of the Communications Act under which they act.

The Court: Well, I will direct the interrogatory to be answered with the understanding that ti doesn't commit

the plaintiff in any way to the conclusion that the FCC had power to do whatever it did, either authorize or approve.

Mr. Hollander: Your Honor, we also have an additional objection to subparagraph (a) because we think that it is an improper question for an interrogatory.

The Court: Which one?

Mr. Hollander: (a), the one we were just talking about, because we think it calls for information which is not only irrelevant or immaterial but which could not possibly lead to relevant or material facts.

The Court: No, I don't think so. I will overrule that objection.

Mr. Hollander: All right, Your Honor.

Mr. Segal: They just don't like our defense, our affirmative defense.

146 The Court: All right. Now, then, you want to know about (c), (d) and so forth.

Mr. Hollander: Yes, Your Honor.

Mr. Segal: Which is that now that is next?

Mr. Hollander: (c).

Mr. Segal: (c) I will withdraw.

The Court: (c) is withdrawn.

Mr. Hollander: (d), (g), (l), (n) and (p), all of which we object to on the ground that they call for our opinion or conclusions as to issues of law.

The Court: Oh, sure. (d) is certainly a pure question of law. You say "facts," but doesn't that all appear in the record? What does the FCC do when they approve a thing? Do they write an opinion or just make an order or define facts?

Mr. Hollander: Sometimes they do one and sometimes the other. In this case, Your Honor, the decision is made with no opinion at all except that there was a dissent by one member so that there was a supporting opinion, so-called, by two other members. It was that supporting opinion that Mr. Segal referred to this morning.

The Court: Then there were opinions?

Mr. Hollander: Yes, Your Honor, that is correct.

147 Mr. Segal: The vote was 5 to 1. One of the concurring Commissioners wrote an opinion in which another one joined, and the one dissenting Commissioner wrote an opinion.

The Court: Then there was no opinion by the Commission as a whole?

Mr. Segal: Well, its opinion was 5 to 1 approving the exchange.

The Court: Then the two Commissioners who actually signed it, they handed down the decision for the Commission?

Mr. Segal: Well, it doesn't work that way. They voted 5 to 1 to approve the exchange. Then, as Mr. Hollander says, the Commissioner who dissented writes a dissent. Then any Commissioners desiring to answer him of the majority do so, and two of them did so.

I think we agree that that was the procedure followed, don't we?

Mr. Hollander: Yes, sir.

The Court: I don't see how you can answer this (d). I don't see how that can be answered.

Mr. Mullinix: Our purpose in asking (d), Your Honor, was simply to ascertain whether plaintiff in this case takes the position that somehow or other the FCC's ap-
148 proval was invalid because it was outside the Commission's jurisdiction.

Mr. Segal: Or that it didn't make a staff investigation, or that it didn't do any of the other things. Here we have private citizens who act pursuant to orders of Government authorities.

The Court: All right. For instance, couldn't you put it this way:

> (d) Does the Government contend that the action of the FCC was invalid because it was acting beyond its jurisdiction?

Mr. Segal: If that were so we would be satisfied with that interrogatory.

Mr. Hollander: Your Honor, may I speak to that for just a second?

The Court: Yes, certainly.

Mr. Hollander: Our only objection to that, Your Honor, is this, that we feel that this is an affirmative defense raised by the deefndants, and they certainly have every right to it and every right to the facts under that, but we don't see that they have any right to our opinion as to whether the Commission was acting within its jurisdiction

or whether it wasn't. We feel that this, of course, will come up later and——

149 The Court: Oh, it will all come up on pretrail, and it is a perfectly proper question on pretrail to define the issues.

I agree it is absolutely all right, but I don't believe I could compel its answer as an answer to an interrogatory.

Mr. Segal: We are just at a loss as to what the position is. Now, we might as well come down to it. We come to the question of whether on or about a certain date the FCC didn't notify the antitrust Division, didn't invite their comment, didn't ask them in, and so on.

Mr. Hollander: And that is what we object to. We don't see that any of that is any of their business at this point, Your Honor.

Mr. Segal: If we don't know that how can we get up our defense, which is based on that FCC approval? Here one branch of the Government comes in and says, "You have violated the antitrust laws." Another branch of the Government says, "You haven't violated them." Aren't we entitled to know whether the branch which says "You have violated the law by doing what the other branch authorized" takes the position that the other branch was without jurisdiction, or having jurisdiction it didn't follow procedural due process? Whether the Government for some reason didn't appeal, as it could have appealed

150 from that grant by the FCC, of which we think it was notified, aren't we entitled to know whether it was notified? Because if it was notified, then we have a defense which we may not have if it weren't notified.

Isn't it a simple question to say to the Government, "Were you notified by the FCC when this application was filed?" How can that be privileged?

The Court: I don't think it is. I think if you put it that way, yes. I don't like the way it is put in the interrogatory. But if you ask the plaintiff whether—what was it, the Department of Justice?

Mr. Segal: That is in (f), Judge. I think it is just the way I did put it.

Mr. Hollander: Your Honor, we would still say that we don't see any possible relevancy or materiality of whether the FCC notified us.

The Court: It may be, I don't know. I will direct that that be answered. I can't say for sure, and we can't always see the immediate relevancy of these interrogatories. That much I will say.

Now, what else do you want answered there?

Mr. Hollander: Your Honor, before you go further, we would like to correct one statement Mr. Segal made.

151 We think he has over-simplified this matter by saying one branch of the Government has said you are violating the antitrust laws and the other branch has said you are not.

The Court: Well, I am not accepting that as more than an argument.

Mr. Segal: That is all it was intended to be. I don't intend to testify at this time. I think we will have more adequate witnesses than I.

The Court: Now, do you want to bother with these others, (d), (e),——

Mr. Hollander: Yes, Your Honor, I would like you to look at these others.

The Court: But, I mean, is he going to press those?

Mr. Hollander: So far it is (d).

The Court: No, it was (f). (f) is the one I directed you to answer.

Mr. Segal: I think it is as you said, Judge, we think this is a good time for the Government to define its position. If it doesn't——

The Court: Well, it is. It wouldn't hurt, but nevertheless if they don't want to do it I don't think——

Mr. Segal: Then we have to try to get it by re-

152 quests for admissions or by pretrial.

Mr. Hollander: Your Honor, we have no objection to having an argument on primary jurisdiction at this point, if that is what Mr. Segal wants.

The Court: I am not ready for it.

Mr. Hollander: That is what we assume, Your Honor, and we are not ready.

The Court: I am only saying if you want to have what amounts to a pretrial right within the next week or so, I am perfectly willing to sit down on a pretrial basis. An awful lot of these things are objectionable as interrogatories, you must agree to that.

Mr. Segal: I think that is right, Judge. Some of them were put in here in the hope that it would simplify things. If we are dealing with private parties and not with the Government I think perhaps some of these we wouldn't ask. We thought the Government would readily tell us these things.

The Court: But I do think some of these are facts. I think (f) is a fact. It may or may not be an evasive fact, but——

Mr. Segal: Yes, that is clearly a fact.

The Court: Now, do you want to press (d)?

Mr. Segal: Not in view of the comment you have
153 made, Judge, with which I agree. I will defer (d) until the pretrial or another appropriate occasion.

The Court: How about (k)?

Mr. Segal: I think they have objected to (g).

The Court: (g)?

Mr. Mullinix: They have objected to everything in this interrogatory.

The Court: They haven't objected to (e), that I see. Oh, yes, they did.

Mr. Segal: Yes, they say that is privileged and confidential. Now, I can't see that. This is whether the FCC made it, not the Department of Justice.

The Court: No, I don't think it is privileged.

Mr. Hollander: We don't claim it is privileged, Your Honor. We claim how are we supposed to know whether the FCC made a full-scale investigation or not, Your Honor.

The Court: All you have to say is that you don't know. That is a perfectly good answer.

Mr. Hollander: All right, if that is what they want.

The Court: Sure.

Mr. Hollander: (f), Your Honor, is the next one.
154 The Court: That is the one——

Mr. Hollander: That is the one you directed us to answer, excuse me. (g).

Mr. Mullinix: (g) is really the same category.

Mr. Hollander (g) we object to on the ground that it probes for information from the confidential files of the Department, which we feel is privileged against discovery.

Mr. Segal: But it is with another party. It is with the Federal Communications Commission. We are not dis-

cussing some important defense question where the welfare of the natio nmay be involved. Here we have a problem of endeavoring to find out just where we stand on what we got from the FCC. The Department of Justice, as we understand the status, is a party in that proceeding and——

The Court: Well, all right. The question will come, however, when they ask you to produce this stuff. At the present time all they want to know is whether——

Mr. Segal: All we are asking is whether it exists.

The Court:—whether it exists, and I see no objection to that.

Mr. Hollander: Your Honor, then we must get
155 into all the subheads of that question (g).

The Court: Well, all they are asking is is there such a thing.

Mr. Hollander: Do they mean written communications, telephone communications?

Mr. Segal: We ask whether it was oral.

The Court: They ask you what they were.

Mr. Hollander: Then they say, "State the substance."

Mr. Segal: If it was oral.

The Court: Where?

Mr. Hollander: No. 3.

Mr. Mullinix: (g)(3).

The Court: All right, I will strike that out and direct it to be answered without requiring them to state the substance. That may be an important enough question to justify more than just——

Mr. Segal: Will you defer consideration of that until we know the documents and come back on that?

The Court: Yes, that is what I say. That is what my idea is. I say I won't require that to be answered at the present time.

Mr. Mullinix: We ask for substance only where it is oral, not where it is written.

156 The Court: I understand, but even so the whole thing is over the dam if they have to give you the substance of an oral discussion. I think I will do it that way.

Mr. Hollander: Now (h) we object to on two bases, Your Honor. First, it calls for information which is part of our work product in this matter. Second, it calls for information from our confidential files, which we feel is privileged.

The Court: How can that be of any value whatever?

Mr. Segal: Judge, let me make this clear to you. You get into everything in this case from the question of res judicata and all else. Here the Federal Communications Commissio nformerly notifies the Department of Justice, as we think, that it has this matter before it. The Department of Justice has the right to communicate with the FCC the same as any other party, and in that respect is no different from any other party. It has the right to appeal the decision if it wishes of the the FCC in that direct proceeding, and if it appeals it, then subject to the law of administrative fact a Court can hear that appeal. There was no such appeal by the Department of Justice.

157 Now, aren't we entitled to know what the Department as one of the three litigant parties in this matter, NBC, WBC and the Department of Justice, what it did with the FCC? No one would object if we asked what Westinghouse did. Why any more when we ask what the Department of Justice did, which has now made itself simply one litigant to a lawsuit?

The Court: What do you mean what they did? They didn't appeal, you know that much.

Mr. Segal: We know they didn't appeal. Now, did they have communications with the FCC? Did the FCC notify them of the facts?

Suppose they said, Judge, "We couldn't appeal because we were never notified."

The Court: Oh, I don't believe that would hold for a minute. I don't believe they could say that. I mean, they are both branches of the Government and I would say they can't—well, I don't' know. That is a snap judgment.

Mr. Segal: Judge, what worries me a little more is, as I look at this I am somewhat embarrassed by the fact that I think everything called for in (h) will be answered by (g), and will be subject to your ruling on (g).

Mr. Hollander: We hoped that the ruling on (h) would be subject to the ruling on (g).

Mr. Segal: I will withdraw (h).

158 The Court: All right, that's it. Maybe you are right about it.

Mr. Hollander: (i) is the next one. We object to (i) on the ground that it calls for information which is part of our work product in this matter.

I think if you read it, Your Honor, you won't need us to explain why we object.

The Court: Oh, yes.

Mr. Mullinix: It asks only for two dates. I don't see how it can be a work product question.

Mr. Segal: How can it be work product it ask them two dates?

The Court: Oh, I don't care about work product. That is a word that really I don't think has much meaning. But what difference does it make what date they decided——

Mr. Segal: Whether they permitted the parties, Judge, and the FCC and everybody to go forward on this, just sitting blinding by and doing nothing and letting vasts amounts of money be expended?

The Court: They couldn't escape an estopel by simply saying, "Well, we didn't make up our mind to do anything about it for three or four months."

Mr. Segal: I think that is right.

159 The Court: If there is an estoppel there it doesn't make any difference when they decided to move, if they didn't move in time.

Mr. Segal: But how much worse in an equity case, Judge—I agree with what you say, but now, suppose it proved that they had made up their mind two months before the FCC even acted and permitted the parties to go forward, you are a judge sitting in an equity case.

The Court: It wouldn't make a particle of difference with me.

Mr. Segal: If they permitted it, permitted everything to go forward after making their conclusion?

The Court: No, I wouldn't care when they decided to move. I don't think it is material. I will sustain the objection.

You have my ruling anyhow, so there you are.

Mr. Segal: Yes, I would say that is very satisfactory.

The Court: You are safe enough there.

Mr. Hollander: (j), Your Honor, we think is similar to (i). It might be material in a criminal matter.

The Court: No, I don't think that is quite the same.

Mr. Segal: I think (j) is entirely different.

160 The Court: It is different, there is no doubt, it is pretty hard to answer.

Mr. Hollander: We haven't alleged anything like this.

The Court: No, but I don't know just what you mean. Everybody withheld some information, I suppose. I don't know whether it was information they were bound to give or not, but certainly all the agents of the two companies didn't all go in in a mass and disclose everything they ever knew about it.

Mr. Segal: Only pertinent information.

The Court: Well, only pertinent information. There may have been a lot of information withheld just because there wasn't any use in giving it.

Mr. Segal: You see here the FCC conducts an exhaustive investigation and reaches certain conclusions. I won't state what they are because then you get into controversy. But as a result of all of their conclusions they say, "This is lily white and we approve it." Now, the Department of Justice comes along and calls presumably the same witnesses, or pretty nearly the same witnesses, as far as we can discover—precisely the same—before the grand jury and as a result of that they institute this action. Now, do they take the position that we or WBC
161 withheld pertinent information?

The Court: I will go right back to where we were with several of the others. I will say that on a pretrial hearing I probably would ask that disclosures be made. I can't do it over objection on interrogatories. It just isn't a request for a fact. Now, if you want to answer it, fine. If you can agree to answer it that is all right. I think it is information that is pertinent—I don't say pertinent, I say it is information which may prove relevant, and that is about as near as you can go on limiting interrogatories. It is germane to the issue that is sure, if you put it that way. It isn't strictly relevant. Very likely it isn't. It is the kin dof interrogatory if it dealt with a fact and not what the Government was going to do I would direct it be answered.

Now, you can decline to answer it and I will sustain your position. On the other hand, if you would like to simplify the matter now, rather than wait until the pretrial, why, it is all right to answer it.

Mr. Hollander: Your Honor, we don't want to take an obstructive position at all about this.

The Court: No, no, I know that.

Mr. Hollander: On the other hand, if we are going to
have an argument on this problem we would rather
162 handle the whole thing on that argument. We feel
all this goes to the question of whether the FCC had
any any authority or could do this.

The Court: Yes, that is right. It all goes to an im-
portant procedural question and to whether you can ask
the other fellow how he is going to try his case. It is an
important basic procedural question. But you can
do it to a large extent on pretrial. You really can't do
it on interrogatories.

Mr. Segal: Of course, I am inclined to agree with you
Judge, that if the Government just doesn't want to answer
now we have to go to pretrial. But the way it is now
developing, Mr. Hollander would have us travel on paralle
tracks. This is the grst time I have heard any question
within the past few minutes of whether the FCC had
authority. Now, if it is going to develop that there is a
question of whether the FCC had authority——

Mr. Hollander: Excuse me. Authority to do what
please?

Mr. Segal: Authority to approve the exchanges.

Mr. Hollander: By approving the exchange, you mean
consent to the exchange of licenses?

The Court: Yes.

Mr. Segal: Well, they granted authority to ex-
163 change licenses, yes.

Mr. Hollander: Yes, sir.

Mr. Segal: Now, if that is going to be the argument
then the defense we had planned runs parallel to it, be-
cause we hadn't ever had any notice in the complaint or
otherwise, or in discussions, that this is the position the
Government is going to take. If it is, aren't we entitled
to know it.

Mr. Hollander: We have made no such position, Your
Honor. All I meant by "authorization" was whether
they were authorized to do anything that would prevent the
enforcement of the Sherman Act. And we think no, and
Mr. Segal knows that. There is no quarrel about that.

Mr. Segal: That is different from what you said a
moment ago.

Mr. Hollander: Pardon me.

The Court: You mean you think it didn't have power to do anything?

Mr. Hollander: Yes, Your Honor. We don't think it had any statutory authority, nor that it meant to do it.

The Court: Well, if the Government stands on its objection I will sustain it.

Mr. Hollander: Would you excuse us for just a
164 minute?

The Court: Yes, all right.

165 Mr. Hollander: We are ready to go ahead, sir.

Is (1) the same one?

Mr. Segal: I would say (k) and (l) fall under the Judge's ruling pretty clearly.

The Court: Yes, I think so. I think that has to be worked out on an argument or on a pretrial. I think the best way to do it would be a pretrial way in advance. There is no reason why you can't have two or three pretrial hearings.

Mr. Hollander: We are all for it, Your Honor. We suggested it to Mr. Segal and he is agreed that we should have one promptly

(Discussion off the record.)

(Friday, June 28, 1957, Washington, D. C., was set as the time and place for a pretrial hearing.)

Mr. Hollander: Your Honor, we in the Government would like to bring on this question of jurisdiction at that time and thrash it out and get it through with so there won't be any further argument.

The Court: The only thing I want you to do is to get it in some shape so I can rule on it. I don't want to have the burden of putting it in the form in which I can dispose of it. I want something that I will have power to rule
165A on.

Mr. Segal: I don't know if we will be ready for that, Judge.

The Court: What is that?

Mr. Segal: Whether we will be ready for argument.

The Court: Well, if you can it is all right with me.

Mr. Segal: I take it at pretrial we get the issues defined.

The Court: You can go as far as you want. I will be at

the Farm all summer except at the time when we have trial up here.

Mr. Hollander: Your Honor, we are anxious to go ahead because we feel we have given full answers to these interrogatories, that defendants have as much knowledge now as we do in this case. We hope we can have a trial in the fall.

Mr. Segal: We don't think so. We think that would have been possible if you answered some of these questions, but I am afraid I agree with the Judge, if you don't want to they have to be taken up at another time. But we are

166 not ready to argue primary jurisdiction until the Court at a pretrial conference goes into the question of whether you don't have to define some of these issues and tell us some of these things.

The Court: Well, please get it in shape for me so that I can rule. You see it isn't in shape now, and I really can't. I have to deny a lot of these things because they are not properly interrogatories.

Mr. Hollander: How would you feel about a motion to strike, Your Honor? Shall we bring it on that way? Is that satisfactory?

The Court: I don't know enough about it to say. I think you fellows can be relied on to put it in a form that really can be disposed of. That is all I want.

* * * * * * * * *

207 Reporter's Certificate to foregoing transcript omitted in printing.

210 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

Notice of Motion—Filed May 31, 1957.

To:

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Of Counsel

PLEASE TAKE NOTICE, that the undersigned will bring the attached Motion on for hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, on June 28, 1957, in Court Room 19 in the United States Court House, Constitution Avenue and John Marshall Place, N.W., Washington, D. C.

/s/ BERNARD M. HOLLANDER

/s/ RAYMOND M. CARLSON
Attorneys,
U. S. Department of Justice

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Motion of the United States for a Preliminary Hearing on the Third, Fourth, and Fifth Defenses Raised by Defendants' Answer—Filed May 31, 1957.

Plaintiff, United States of America, by its attorneys, moves this Court pursuant to Rule 12(d) of the Federal Rules of Civil Procedure for a preliminary hearing on the following defenses raised in the Answer heretofore filed by the defendants in this cause on the grounds and for the reasons hereinafter set forth:

1. The defense that this action is barred by the administrative finality of the Federal Communication Commission's action as set forth in Paragraph 28 of said Answer;

2. The defense that this Court lacks jurisdiction over the subject matter of this action as set forth in Paragraph 29 of said Answer;

3. The defense that plaintiff is barred from maintaining this action by the doctrines of res judicata and collateral estoppel as set forth in Paragraph 30 of said Answer.

Since the jurisdiction of this Court has been challenged by the defendants, plaintiff requests that the adequacy of these defenses be determined before trial in order to settle the question of jurisdiction and to expedite and narrow the issues at trial, and further requests that this Court hold a preliminary hearing on these defenses at the pretrial conference set for June 28, 1957, at the United States Court House, Washington, D. C.

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/s/ Bernard M. Hollander
/s/ Raymond M. Carlson
Attorneys,
U. S. Department of Justice

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, SS:

I, Gilbert W. Ludwig, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original record in the case of United States of America v. Radio Corporation of America and National Broadcasting Company, Inc., Civil Action No. 21743 (except Pages 66 through 209, which are originals), the same now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 28th day of March, A.D. 1958.

GILBERT W. LUDWIG,
Clerk.

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213 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

Petition of the Federal Communications Commission for Leave to File Memorandum of Law as Amicus Curiae—Filed June 19, 1957

The Federal Communications Commission respectfully petitions the Court for leave to file, as *amicus curiae*, the attached memorandum of law directed to the legal questions raised by the third, fourth, and fifth defenses in the defendants' answer heretofore filed with the Court. The grounds for this petition are the following:

1. On May 31, 1957, the United States of America, plaintiff in the above-entitled action, moved, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for a preliminary hearing on the third, fourth, and fifth defenses raised by the defendants' answer. These defenses are based on proceedings before the Federal Commu-

nications Commission which resulted in the Commission's action of December 21, 1955, approving the exchange of certain stations between Westinghouse Broadcasting Company, Inc. and the National Broadcasting Company, Inc. (WTAM, WTAM-FM, WNBK(TV) in Cleveland; KYW, WPTZ(TV) in Philadelphia). (FCC Public Notice 27067, Rep. No. 2793). The defenses raise jurisdictional and related objections (such as administrative finality, *res judicata*, and collateral estoppel) to the pending antitrust action. Pursuant to the notice of the Clerk of this Court issued June 7, 1957, all briefs to be filed in connection with the above-mentioned motion of the plaintiff are to
214 be submitted on or before June 19, 1957.

2. Since the three defenses in question are based on proceedings before the Federal Communications Commission and relate to the legal effect of such proceedings and the actions taken therein, the Commission is vitally interested in the resolution of the issues so raised. Moreover, inasmuch as these defenses advance interpretations of the nature and legal effect of Commission action which we think are legally unsound, if not factually erroneous, the Commission believes that it can be of assistance to the Court in the determination of these issues.

For the foregoing reasons, we respectfully request permission to file, as *amicus curiae*, the attached memorandum of law directed to the jurisdictional and related matters raised in the third, fourth, and fifth defenses in the defendants' answer and in the plaintiff's pending motion for preliminary hearing.

Respectfully submitted,

/s/ Warren E. Baker
General Counsel
/s/ Richard A. Solomon
Assistant General Counsel
/s/ Henry Geller
Counsel
Federal Communications Commission

June 18, 1957

215 Certificate of service

(Omitted in printing)

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216 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

[Title omitted]

Washington, D. C., Friday, June 28, 1957
Before Hon. William H. Kirkpatrick, Ch. J.
(In Chambers)

Transcript of Pretrial Conference

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Appearances

Present: Bernard M. Hollander, Esq., and
Raymond M. Carlson, Esq.,
Attorneys, U. S. Department of Justice.
Schnader, Harrison, Segal & Lewis
by Bernard G. Segal, Esq., and
Edward M. Mullinix, Esq.
Cahill, Gordon, Reindel & Ohl
by Lawrence J. McKay, Esq., and
Dennis G. McInerney, Esq.,
Attorneys for defendants.

Also Present: Victor H. Kramer, Esq.,
Attorney, U. S. Department of Justice.

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218 The Court: All right, gentlemen. Now, how shall we proceed? Who wants to start?

Mr. Segal: We have a difference of opinion, I think, on procedure. First of all, physically we couldn't do what the government wants if we wanted. As you know, Judge, I fixed today because I would be away all of the time up to today, and on Friday came, I think, the government's brief and the FCC both.

The Court: You mean the——

Mr. Segal: The Department of Justice and FCC.

Some of it I read coming down here this morning. But entirely apart from that, the government would like to proceed under 12(b) to have all of our affirmative defenses just argued in a kind of vacuum. They admit most of the bare statements in the pleadings, they deny some others in the affirmative defenses, and then proceed under 12(b) in what looks more to me, except for their denials, like a motion to strike under 12(f).

The simple fact is that we would as much like to get that issue resolved as the government would. We want to get it resolved when we have the kind of record we think the Court ought to have to decide whether
219 it ought to be so determined. We think the time will come when an appropriate consideration for the Court will be whether a separate trial ought to be had on those issues under Rule 42(b).

The Court: You are talking about rules. I better get the book.

Mr. Segal: Here is my copy.

Mr. Hollander: You said 12(b). The motion is under 12(d).

Mr. Segal: Did I say (b)? I meant 12(d).

The Court: 42(b) is the trial of separate issues, is it?

Mr. Segal: Yes.

> "The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim . . . or of any separate issue . . . or issues."

The Court: Yes, that is right.

Mr. Segal: There is a good deal, we think, that has to be brought into the record before we could present

the issue to Your Honor. At that time, if we can conscientiously say, as we hope we could, that it would save the time of the Court to try the issues separately,
220 we would be all for it.

The Court: Well, what are we to take as the issues that might be the subject of separate trials?

Mr. Segal: Well, they would be the affirmative defenses which we have raised. Let me give them to you. One is the—well, the government doesn't now try to argue the second affirmative defense, which is failure to state a claim on which relief can be granted. If you will refer to our answer, at page 6 is the second defense, and that is the failure to state a claim. That is not in issue. Then there is the third defense.

The Court: And that is what?

Mr. Segal: If you look at averment 28, on page 8:

> "This action is barred by the administrative finality of the Commission's action."

The fourth defense is lack of jurisdiction over the subject matter, and the fifth defense is res judicata and collateral estoppel.

Now, the government wrote a letter to you, you will remember, Judge, in which they said in effect that all factual allegations of the pleaded defenses are admitted, except that while it is admitted that the in-
221 vestigation of the Federal Communications Commission was extensive, it is denied, as we aver, that there was a full investigation, and it is denied that the Antitrust Division was continuously informed by the FCC as to facts related to the exchange. But reference is made to a forthcoming answer to an interrogatory, which has since come, which sets forth the bare dates and the names of people in the two agencies who had communication either written or oral.

Now, we said when we arranged this pretrial hearing that we did not think it would be ripe for this question. Since then we have notified the Department of Justice representatives of our views on that. As I say, in any

event, we wouldn't be prepared to argue it today, but entirely apart from that, the thing is just simply not ripe for consideration.

Under 12(d) the only one of those defenses that technically could be considered anyway is the lack of jurisdiction over the subject matter. You will remember that 12(d) refers back to 12(b) and says that those defenses are the ones covered, defenses 1 to 7. Certainly res judicata and collateral estoppel and administrative finality wouldn't come under that at all. That is why
222 we think Rule 42(b) is the more appropriate one to apply to this case.

Now, of course, even under Rule 12(b) cases, the taking of testimony and affidavits and the building of a record is not only permissible, but is customary wherever it is indicated.

Mr. Hollander: That is true where there are factual issues.

Mr. Segal: Yes, and we think there are substantial factual issues. We think with the notice pleading and the bare averments we have made, they certainly don't give the Court the background or the information which is necessary here.

The Court: Well, for example, what factual issue would there be in connection with the defense of the finality of the administrative action of the Commission?

Mr. Segal: For one thing, we would like to know the entire story of what occurred in the FCC's consideration. We have a number of stories now. This thing has been aired in Congressional investigations, commissioners have tetified; any privilege that may have been existent seems to me to be gone. The Assistant Attorney General has testified at
223 length. They have put into the record reports of investigators. They have read from or referred to the deliberations. The story you get is just simply different.

First of all, the Commission's story appears to us to be quite different within itself. We think that what some of the commissioners said in the hearing is quite different from what the government in its brief says here.

Mr. Hollander: Do you mean in the hearing before the Congress?

Mr. Segal: The hearing before the House Subcommittee.

The Court: But as far as the defense goes, is that of any importance?

Mr. Segal: Oh, sure.

The Court: I mean, an order is an order, and if it is final——

Mr. Segal: But we think it is very important, Judge, to know just what was decided here. For example, was the antitrust question passed upon? We don't know whether the Department of Justice argues it was or it wasn't.

224 You remember when we asked those questions by interrogatories the Department said they didn't think they were proper for interrogatory. You said—and I read this in the transcript coming down—that you couldn't force them to answer the questions by interrogatory, but you thought that you could very well ask them to define their position at pretrial conference.

The Court: Yes.

Mr. Hollander: We feel we have done this by the letter and by our admission in our brief, Judge.

Mr. Segal: Not at all.

Mr. Hollander: We would like to know, if I may interrupt a second, just what you said, what facts there are that Mr. Segal feels aren't admitted that have any significance to these three defenses whatsoever.

Mr. Segal: We would like to know whether the Department of Justice contends that the Federal Communications Commission did not consider possible antitrust questions that might be involved in the exchange applications. That might be critical to a determination of this issue.

The Court: Oh, you don't need any very great hearing for that.

Mr. Hollander: Certainly not.

225 The Court: The Department of Justice can state any time—now, if they want to—what their position is on that.

Mr. Segal: If they want to.

Mr. Hollander: And we think we have.

Mr. Segal: If you have it has escaped us, and we have tried to read it carefully.

Now, the brief submitted here, Judge, by the FCC——

The Court: Let me ask the government. Are you going to contend that the antitrust phase of this thing was considered or not considered by the FCC in arriving at their opinion?

Mr. Hollander: Our answer is very simple, Your Honor. We say that it has no materiality or relevance to the question, but our position is, as a matter of law, whether they did or they did not consider it has no bearing here, in light of, as you say, the order that was entered. And the Commission has made it quite clear by a brief which it submitted to you that it did not feel that it either had the power or that it has considered the antitrust issue.

I think that is quite clear on the record.

226 Mr. Meade: That is a good legal argument, but it doesn't go to what Bernie wants in his facts. Either they did or they didn't.

The Court: He says the Commission itself says that they did consider it.

Mr. Meade: That is just in a brief, though.

Mr. Segal: Judge, the Commission says that in its brief, and that is precisely the point. I could read to you statements made by the Chairman where he says, "We always consider that and we did consider it here." I could read you statements by Commissioner Doerfer in which he said, "We consider it, we did consider it here, and if the Department of Justice has the information we had and no more, I think they are just wrong."

Now, that kind of thing is the very kind of thing that we think ought to be developed. Mr. Hollander says, "We did answer it." When Your Honor asks him what is the answer, he says, "Well, we don't think we have to give it."

Mr. Hollander: I just said that for the purposes of this case we are perfectly willing to admit that they con-

sidered the antitrust issues. We don't think it has any relevance.

227 Mr. Segal: This is the first time we have had that. Now, there is a whole slew of that type of thing——

The Court: Yes, I think you probably have to admit it when you deal with their own statements.

Well, now, there is that.

Mr. Hollander: What other facts?

Mr. Segal: We would like to know the liaison between the Department of Justice and the Antitrust Division, which goes very much to the question of res judicata and the question of collateral estoppel.

The statements made in the government's brief differ from those made in the letter to you by the Department. The statements made at various of these hearings differ. We think that that ought to be developed. In other words, each of these things provides the background for you to decide the issue. It is a big issue, it will be the first time it has ever been decided. If we file a brief on this question we will cite cases where the courts have said again and again that that kind of issue, particularly where it is de novo, ought not to be decided in a vacuum; that the appellate courts ought to have the benefit of the background.

228 Very frankly, when we drew three or four averments sufficient to keep us in court under notice pleading, we did not plan to set forth what we thought Your Honor ought to know to decide that question.

The Court: Yes, I know. But if in a case like this you could stipulate all the facts, it can't be possible that any court would object to deciding the issue on the stipulation without going into a mass of testimony.

Mr. Segal: If the government wishes, we will be glad to get up what we would regard as a fair stipulation of facts and see if they would agree to it.

Mr. Hollander: Your Honor, we want to hear what these facts are. We would agree to any facts, for the purposes of this case, that Mr. Segal wants to present, within reason. But there are not more than two or three facts that he has mentioned.

Why do we have to delay it? This is a simple case and the government is well aware of the complaints of defense counsel over and over again, that these cases are protracted and dragged out. We don't see how this is hearing this question in a vacuum, Your Honor. We feel that everything is before you now that is going to be before you.

229 The Court: That is what I was going to say. It does seem to me that if you can get the facts stipulated——

Mr. Segal: Judge, as far as we are concerned, if we can have the agreement of the government to a stipulation of facts which we think would present to the Court the full story so the Court had it before it, we would cheerfully do it now, because we would like to get this issue decided. We do think that it is going to have to be Rule 42(b), just because I don't see how Rule 12(b) can apply to a decision on res judicata or collateral estoppel.

The Court: Well, I don't think it makes an awlful lot of difference. If you get stipulated facts we would try the issue on that under 42.

Mr. Hollander: May I also point out to Your Honor that it is perfectly feasible for you to strike under Rule 12(f) at any time if the matters brought to your attention indicate to you that these should be stricken, these defenses.

We feel that we have gone all out. We don't know how we can admit anything more to bring these to an issue.

230 We are puzzled very much by Mr. Segal's position, frankly, Your Honor. He sets forth in paragraphs 20 to 27 of his answers the facts upon which he says he bases his defenses. We in essence admit these facts, and now he says that this is deciding the issue in a vacuum. We just don't understand it.

Mr. Segal: Well, now, let me say to Your Honor that I could give you I suppose an endless number of cases—I have made note of some of them—in which again and again counsel has made the very statement that has just been made and the Court said, "We just don't think a motion to strike on that bare record is enough."

Now, I come to this point, we are puzzled by the fact that each time we appear before Your Honor we are told that all the facts have been given, "We have answered the interrogatories without any reserve and we have given them everything that they want." Then we start looking for it and we simply don't find it. We have many pages of interrogatories, but we don't have the answers to them.

The Court: Of course, it depends on what are the strictly relevant facts. I know that the whole story can be elaborated and embroidered without limit. Almost everything that everybody said in the course of all these proceedings is a fact. I mean, somebody said this and somebody said that——

231 Mr. Segal: You know we don't mean that, Judge.

The Court: I am just suggesting that there are certain basic facts, most of which, it seems to me, are already admitted.

Mr. Meade: I was just thinking. Take his res judicata, what he needs to establish res judicata on his theory. He needs to prove a judgment, I suppose.

Mr. Segal: Needs to prove the same——

Mr. Meade: You need to prove the issues involved in that judgment and the parties thereto.

Mr. Segal: That I don't think we have. In any event, we would like to have it more clearly on the record.

Mr. Meade: I don't know. That might be easily gotten, though.

Mr. Hollander: We believe you have it already.

The Court: Yes, you really do. As a rule,——

Mr. Meade: The government might stipulate that quickly.

The Court: —where you plead res judicata, where
232 the issue is res judicata, as a rule the written record is in most cases enough.

Mr. Segal: If we have the written record. Now, you remember, Judge, what you had in the Lawler case. You had all of the record of the first proceeding, which went up to the Supreme Court; you had depositions in that case; then you had the record in the second proceeding. Now, here if we had the FCC record before the Court, if we had

the Department of Justice record before the Court—they have all the Grand Jury minutes which they say are sacrosanct, but if we had those records before you, then we would have what you had before you in the Lawler case.

Mr. Hollander: May I interrupt you just a minute? What is the record before the FCC? The record before the FCC is what we sent Your Honor: A supporting opinion, no majority opinion; a supporting opinion and a dissenting opinion by the Commission. Mr. Segal speaks as if there is litigation in this case. There was no hearing by the Commission whatsoever. This was decided in executive session, as Mr. Segal knows.

How in the world we can have a question of res judicata when there was no issue before the Commission that was litigated, where there is no question of the same parties and the same cause of action; how in the world can
233 there be a problem of res judicata?

Mr. Segal: That just simply isn't so. The Commission had before it a voluminous record, many, many, many pages of which were put in verbatim before the Celler Committee. Otherwise we woudn't know it. The Commission had before it the results of two most exhaustive investigations. They put in the almost question-and-answer results of interviews with every one of the people whom they interviewed.

Mr. Hollander: Did they hold a hearing and take evidence, Mr. Segal?

Mr. Segal: As you well know, the procedure before the Federal Communications Commission under the Act is that the hearing is the unusual and not the usual procedure. But the exhaustive investigation which comes to the Commission in written reports is the customary procedure, and that was followed here. You have read them, I am sure. When you say to the Court that the total record is comprised of those two opinions, you know very well that isn't so.

Mr. Hollander: I am talking about the opinion of what issue was adjudicated in this case before the Commission,

since you are calling it an adjudication of a case
234 before the Commission.

Your Honor, I would like to point out that in every case what in effect Mr. Segal is saying is that the FCC has a power to grant an exemption under the antitrust laws.

Mr. Segal: No.

Mr. Hollander: Now, we claim, first of all, wherever Congress intended that, it is very clearly spelled out in the statute; that the cases, like Far Eastern Conference and McClane Trucking, in both of those there was an antitrust exemption. Congress provided that what the Commission did in that case or what the Board did was subject to antitrust exemption, but only after there was a hearing and evidence taken before that Board. The safeguards are very carefully set up wherever there are such exemptions. There is no such exemption nor any provisions for the Federal Communications Commission to do this in the Communications Act, except as to common carriers, Your Honor. And broadcasters are not common carriers. We don't see how in the world there can be a question of res judicata and collateral estoppel.

Mr. Segal: There is an express provision, Judge,
235 in Section 7 of the Clayton Act applying to acquisitions. The government for some reason, the FCC in its brief, says that Section 7 applies only to a stock acquisition, and that there was no acquisition of stock here. Well, of course, it applies to the acquisition of assets also.

Mr. Hollander: This is a Sherman Act case.

The Court: You don't need any facts to determine this issue that you are talking about now.

Mr. Hollander: Certainly not.

Mr. Segal: No, that will be legal questions out of facts.

The Court: Is there any question that the FCC decided when it issued its ruling that the merger was in whatever they say, in the public interest, or——

Mr. Hollander: Of course, they must under the Act find that it is in the public interest.

The Court: Yes.

Mr. Hollander: Our position, Your Honor, is that it was perfectly permissible for them to consider antitrust issues, and they could have turned the license down on that basis.

The Court: All right. They have done that.

236 Mr. Hollander: They have found it in the public interest, yes, sir.

The Court: And there it is.

Mr. Meade: And they considered the antitrust feature, the government is willing to concede.

Mr. Hollander: We will admit that for the purpose of this case.

The Court: Yes, for the purpose of this case.

Now, what does it matter whether they did a good job or a bad job, or whether they had all the facts before them or whether they just dreamed up some facts? You can't go into that on the issue of res judicata.

Mr. Segal: No.

The Court: If there is no dispute about what the judgment was and who the parties were, I don't see that it makes a particle of difference what was considered in arriving at that judgment.

Mr. Segal: I think if we can get into the record a stipulation of that fact, and a couple of others that I will come to, which will require some thought on our part, it will answer res judicata. Then we have the collateral estoppel.

Then we have the issue of administrative finality. On

237 the question of just what was the participation of the Department of Justice, McConnaughey testified that he promptly notified the Department of Justice——

The Court: Now wait a minute. Before you go on, collateral estoppel, we had that in the Lawler case. That is where the issues were not the same, where the——

Mr. Mullinix: Where the cause of action is different but there are identical issues.

The Court: Yes, all right. I went into it in that other case.

Mr. Segal: That is right. Here an agency of the United States decides these specific issues.

Incidentally, we don't argue exemption. All through the government's brief, which I read this morning, they seem to argue that we in some way are desirous of saying that there was an immunization that we could violate the antitrust laws, and that the Commission would have the right to let us violate it, as the ICC, for example, has the right with respect to carriers. It can expressly authorize a violation. We don't argue that.

Mr. Hollander: With respect to carriers.

Mr. Segal: With respect to carriers. Now,——

Mr. Hollander: Mr. Segal, do you claim——

238 Mr. Segal: May I just finish this?

We don't argue that we are immunized at all. We say that here the Federal Communications Commission has carefully considered the very issue that is here raised. They had before them, as far as we know, the identical facts. We are trying to find out whether there were any other facts. Thus far we have been thwarted, and we intend to try to find out.

But as Commissioner Doerfer said, as far as he knows they had the same facts. In any event, they were promptly notified and continuously kept notified by the Federal Communications Commission. The Chairman of the Commission testified that he waited and waited and waited and waited—and I think I quote him exactly—and he got no action out of the Department of Justice. They didn't intervene, as they had the right to intervene; they didn't notify him that there was anything wrong, and, as he says, "If we sit back and wait, we will just never get anything accomplished." So they sent a letter out saying, "There are these issues as to whether there are antitrust violations"——

Mr. Hollander: Would you mind telling the Judge at this point what we would intervene in, Mr. Segal?

239 Mr. Segal: In the proceedings.

Mr. Hollander: What proceedings?

Mr. Segal: "—in accordance with the Act. When this was granted, you would have had the right to submit, as

you were notified by the Commission, and as the statute expressly permits,"——

Mr. Hollander: No question about that. Admitted.

Mr. Segal: I don't think we will get much by question and answer. Won't you just let me make a statement?

Mr. Hollander: Mr. Segal, you are putting all kinds of words in the Commissioner's mouth, and we don't agree with this and we don't think it has any relevance.

Mr. Segal: We think it is very important to our defense. We don't think we can argue until we establish the question of administrative finality, until we show that this other branch of the government, namely, the Department of Justice, simply stood by and didn't exercise any of its rights and is now endeavoring collaterally to attack the order of the Commission which it could have done directly.

240 You say what right? Do you challenge the fact that the Department of Justice had the right to appeal this decision of the Commission?

Mr. Hollander: Certainly not, and that is why we say the doctrine of administrative finality has no bearing here. What you are talking about is an appeal from a decree of the Commission which we have not contested and are not contesting.

Mr. Segal: But the Commission expressly authorized an exchange of stations, and they expressly ask Your Honor to undo the exchange of stations. If that is not an attacking of an order I don't know what it is.

Mr. Hollander: That is not an accurate statement, Mr. Segal. We have asked for a divestiture of NBC's assets. That is a part of what was involved in this transaction in the first place.

In the second place, we have nowhere asked to annul or enjoin or do anything about the FCC decree. We are asking for Sherman Act relief as set forth in Section 4 of the Sherman Act and 313 of the Communications Act, which expressly recognizes our right to do exactly what we are asking for.

Mr. Meade: Well, will this help,——

241 Mr. Hollander: Will what help, sir?

Mr. Meade: This thought, that the government is willing to concede that they were fully aware of what was going on and felt that they were——

The Court: That is, the Department of Justice.

Mr. Meade: The Department of Justice, felt that they were not legally bound to do anything about it, and it has no relevance, and that puts you both in the same spot.

Mr. Hollander: That is exactly what we say.

Mr. Meade: I mean, Mr. Segal gets everything he wants.

Mr. Segal: And that they were continuously kept informed of what was going on.

Mr. Meade: All right. They were fully aware. That is as broad as it can be.

Mr. Segal: All right, I had missed those words.

The Court: I can't help feeling that the issue is awfully narrow, and I am just as sure as I am sitting here that if we don't really take a fairly firm position about it
242 we will load this thing up with such a mass of testimony that it will just bury the issue under a whole lot of minor matters that may have some remote relevancy but that really are of no importance whatever.

Mr. Meade: Well, maybe it is not that bad. I was thinking of all the evidence it would take to prove that they were fully aware, all these letters to the Commission. The government admits it, so why bother with that proof?

Mr. Segal: As I said, Judge, we would be glad to get up a stipulation of facts and certain admissions along the lines of what has been said here, if the government agrees to them, subject to your rulings if we disagree, as to whether they are reasonable or not.

Mr. Kramer: Relevant.

Mr. Segal: Vic Kramer says "relevant." I would concur with that. I think they would have to be relevant. I was trying to make it broader than that.

The Court: This is a pretrial hearing and any statement that the government makes as to its position is a binding statement,——

Mr. Hollander: Correct, sir.

The Court: —and the case proceeds on the basis of that. Here you have now what strikes me as very
243 broad admissions that really do pose the issue.

Mr. Hollander: That is what we tried to do, Your Honor.

The Court: Or the issues. I don't suppose there is any way of preventing the defendants from asking the government to admit any amount of stuff. I could say this, that it might entail another argument, but I could eliminate a lot of requests for admissions that might seem to me immaterial or not important.

Mr. Segal: Now, for example,——

Mr. Hollander: Could I speak to that for just a moment, Mr. Segal?

The only thing we object to in this procedure suggested by Mr. Segal, Your Honor, is it can't do anything but delay this case. We have already admitted what he wants us to admit. He fails to give us a single fact that we haven't admitted. Why should we have to stipulate or give further admissions? As you point out, we are bound by what we said here.

The Court: Yes, you certainly are.

Mr. Segal: For heaven's sake, Judge, to have the government talk about our wanting to delay the case by a procedure that would take a week when they sat
244 by for a year and a half and did nothing; they sat by for a year after this thing was approved and did nothing; they filed suits one year after the Commission gave them every solitary fact the Commission had. And that has been testified to. Now to say, after sitting by a year and a half after they have notice, and a year after the decision, and say, "Well, we would be for it except we think that if Mr. Segal takes a week or two to get up a stipulation and asks for admissions, why, that will unduly delay the case," I think is pretty unconscionable.

The Court: I know, but you wouldn't want to argue that because the government has unreasonably delayed it you ought to have a right to unreasonably delay it.

Mr. Segal: No. But I say it is comparative, Judge, to say after they did that, that they are so much in a rush now.

The Court: Well, the only question is whether we are not all in a rush now, whether we ought not to be in a rush. Any case, when it comes to me, I would like to put it through as quick as I can.

Mr. Segal: I agree with that.

The Court: I don't care what kind of a case it is.

245 Mr. Segal: But you do get to the question of whether if you have a party to whom a week or two's delay is a great inconvenience, I am sure Your Honor is otherwise affected.

Mr. Hollander: It is not the delay, Your Honor. What we don't care for is admitting things that we have already admitted. What more does he want us to admit, Your Honor?

Mr. Segal: I know I am not going to think of them all sitting here. It it going to require careful thonght with my associates. But do you concede that all of the antitrust questions raised in your complaint have been passed upon by the Commission, for purposes of this case?

Mr. Hollander: Certainly not. That is why it is an antitrust case and not a case——

Mr. Segal: There you are.

Mr. Hollander: —subject to administrative finality, res judicata or collateral estoppel.

Mr. Segal: That is why we have to break it down and see what they do concede or do not.

The Court: Excuse me. How do you mean "passed upon"? Do you mean did they talk it over? What do you mean by "passed upon"? The order is a very

246 brief thing. What they do admit is that they considered the antitrust phase of the matter. Now, when you say "passed upon," I was wondering what you have in mind.

Mr. Segal: I don't emphasize the words "passed upon." I emphasize the word "all."

Let me give you just what I have in mind, Judge. The

government has attacked, and we think their primary purpose is to attack—and this is a subjective statement—the acquisition by NBC of the assets of the Westinghouse station in Philadelphia pursuant to this order. But they have also said that they consider a violation the purpose of the NBC, and they tie in its parent in order to spell out some kind of conspiracy. But they consider it also to be a violation that their objective was—and they say still continues to be, as far as they know—to acquire other good outlets by sale or exchange or other means to be approved by the Commission.

Now, what I would like to know is does the Department of Justice concede for purposes of this argument that the FCC considered that phase, or do they concede only that they considered the first phase? They have split them into two. I would like to know whether it is the two as to which the concession is made or only
247 the one.

Mr. Hollander: I frankly don't know what you are talking about.

Mr. Segal: Let me try again.

You argue that the contract itself is in violation of law.

Mr. Hollander: Yes, sir.

Mr. Segal: You also argue that the purpose and intendment of NBC to acquire five of the eight primary markets is a violation of law.

Mr. Hollander: Yes, sir.

Mr. Segal: Now, my question is whether it is as to both of those that you made the concession that you earlier did for purposes of the argument.

Mr. Hollander: I don't think we have been talking in your terms about the conspiracy at all. I mean, we hadn't even gotten to that. All we are talking about is the transaction that was before the FCC, the approval of the grant. As to that, we admit for the purposes of this case they have passed on it.

How they could possibly pass on an unexercised part

of a conspiracy is beyond me. I don't understand what you mean by that.

248 Mr. Segal: Let me tell you what I do mean.

All of the evidence as to the intention was before the FCC. The whole transaction was described in detail, as you know from having read the reports of the investigation. The endeavor to get into Boston and Philadelphia were all aired in full before the FCC. The prior endeavor to get Detroit, for example, was aired before the FCC.

Mr. Hollander: Excuse me. What do you mean "was aired before the FCC"? Would you explain that?

Mr. Segal: All the facts as to that were exhaustively developed and made the subject of reports following interviews by the investigators to the Commission through the Broadcast Bureau.

Now, it is our view that the FCC necessarily under the statements which its individual commissioners have made, and under its general statement of policy, considered that entire background in approving this one exchange transaction which was the outgrowth of a single course of action.

Mr. Hollander: And you wish to ignore what the Commission tells you in its brief, and has said repeatedly, that it was not passing on the antitrust issues and that it had no power to pass on the antitrust issues.

249 Mr. Segal: That is one of the reasons that I don't think this is ripe to be tried, because if the Court is going to be influenced by a statement in a brief——

Mr. Meade: (To the Court) I don't believe they are really disagreeing now.

Mr. Hollander: I think you are correct.

Mr. Segal: Bert, what I was going to say is here Mr. Hollander refers to the fact that the Commission says in its brief a certain thing. Now, that we say is very different.

Mr. Meade: I don't think you are disagreeing, though, because I think the government is saying—this, of course, isn't phrased for a stipulation—I think the government is saying all that evidence was before the Commission but it had no power to make a binding decision on this.

Mr. Hollander: Precisely.

Mr. Meade: The government is willing to say they tried to make a binding decision, if you wish, or at least they considered it in making their judgment. Now, whether it is binding or not, you are saying it is binding and the government is saying it isn't.

250 Mr. Segal: I agree with that, Bert. If we got the concession you just stated, then we could argue the rule of law on that point.

Mr. Meade: In other words, the government says, "It is there but they had no power to bind us." You say they did.

Mr. Segal: That is all right. If we can get that——

The Court: You see, you are using terms I don't understand. I don't know what "passed upon" means, and I don't know what "consider" means. It was there; the data and the stuff that they had was there, and they knew about it and they evidencely thought about it. But when you say did they pass upon it, that is a phrase that I can't understand.

Mr Meade: It is immaterial, isn't it, sir? I mean, if they had power to consider the issue, I mean, power to bind the government on the issue, and it was there, it doesn't make much difference what they did to it.

The Court: Yes.

Mr. Meade: They did make a decision.

Mr. Hollander: That is right.

251 The Court: Well, that's it. If the government admits or agrees that the FCC intended by its ruling to foreclose that question, that raises the question.

Mr. Hollander: The only thing we cannot admit, Your Honor, is that the FCC thought it was binding us. We can't admit that.

Mr. Meade: No, they can't.

The Court: Then you can't admit they intended to bind you either.

Mr. Meade: Yes, they can admit that they intended to cover everything within their jurisdiction.

Mr. Hollander: That is right, correct.

The Court: Sure. That doesn't get you anywhere.

Mr. Meade: Sure it does.

Mr. Hollander: Our argument is very simply, Your Honor, exactly what Mr. Meade said. The FCC, no matter what it did, had no power to do this, to give immunization against a Sherman Act case. We don't think it intended to, but we don't think it matters whether they intended to or they didn't intend to. They had no power to do it and they didn't do it.

The Court: If that is so, why couldn't you concede
252 that that was part of the intent and purpose of the Commission? That clears the point.

Mr. Hollander: Mr. Kramer points out that because it was an agency of the government that is pointed out to you, that it did not intend to do so, and therefore we don't want to take that position.

The Court: I can see that

Mr. Segal: Well it is pointed out in counsel's brief in this case, and I say to Your Honor that that is contrary to statements that have been made in sworn testimony.

Mr. Meade: Is their intention material?

The Court: I am not sure that it is. Mr. Hollander is saying that their intention is immaterial one way or the other, and that if they did intend to do it it still wouldn't have any effect.

Mr. Meade: He has already said they considered it.

Mr. Segal: Then he ought to concede it for the purpose of the argument.

The Court: Well, "for the purpose of the argument" doesn't mean anything.

Mr. Hollander: We have done that.

The Court: He has really done it.

253 Yes, if he says, "Our argument would be exactly the same whether the FCC intended to cover this question or whether they didn't," that is really conceding it for the purpose of the argument.

Mr. Hollander: Precisely, sir.

Mr. Segal: Yes, and then we get the statement—and I think I am stating it correctly—"what we cannot concede is." That is why I want to get this down in a form where we are all going to know the basis on which Your Honor has made the decision, if there is an appeal.

Mr. Meade: Could you stipulate this—and this would satisfy Mr. Segal, I think—that the evidence on all phases of the antitrust questions was before the Commission and they decided all matters within their power to decide.

Mr. Hollander: Yes, for the purposes of this argument we do concede that, certainly.

Mr. Segal: I would consider that a substantial step in getting the thing off.

Mr. Meade: Their intention is then immaterial, isn't it, Mr. Segal, if they decided all matters within their power?

254 Mr. Segal: Oh, yes, I think on that point, Bert. All I meant was there were other issues on the subject that you are addressing yourself to. I would say at first blush that that would meet what we are seeking.

The Court: There isn't an awful lot left, as we are going along here.

Now, what else? We are talking about administrative finality and we have talked about res judicata and collateral estoppel.

Mr. Hollander: The third one is the one specifically laid out in 12(d).

The Court: Jurisdiction.

Mr. Hollander: Yes, sir, jurisdiction over the subject matter. That is the only remaining one.

The Court: How is that raised?

Mr. Meade: I guess that is pure statute, is it?

Mr. Hollander: They are all three raised on the basis of paragraphs 20 to 27.

The Court: Is there any fact involved in that one?

Mr. Hollander: None other than 20 through 27 that
255 we have just been talking about, the relations between the FCC and us, and what the FCC did.

Mr. Segal: What was that?

Mr. Hollander: What the jurisdiction of the subject matter is based on. It is based on the same paragraphs 20 to 27 as the other two, correct?

Mr. Segal: Right.

The Court: Here it is, the first defense, I have it.

Mr. Hollander: They are the third, fourth and fifth defenses, Your Honor.

The Court: Yes, I know what they are. And what is the argument? Why does this Court lack jurisdiction over the subject matter of the action?

Mr. Segal: Well, that is what we have been talking about. The fact that the FCC decided these very issues——

The Court: In other words, it is the same question only put in terms of jurisdiction.

Mr. Segal: That is correct.

The Court: All right, that is all I wanted to know about that. Then that involves nothing more to discuss.

256 Now, it wouldn't be a very difficult job to sort out these admissions that we have on the record and find out what more Mr. Segal wants.

Mr. Segal: Yes. What I would like to do is study the concessions made, confer with general counsel for each of the two defendants whether they feel the record is then in shape for argument, and with my associates, if we think not, submit through you any other concessions we would like to have.

The Court: Why don't you submit it under Rule 36, requests for admissions.

Mr. Segal: That is what we could do. I mentioned earlier, Judge, that we would submit a stipulation of facts or requests for admissions.

The Court: I think that is the thing to do just requests for admissions.

Mr. Segal: The difficulty with the requests for admissions procedure, Judge, is that the government might be loath to do it because it might be constituted as an admission on the merits, if we went ahead to trial.

The Court: I don't care. If you submit a proposed stipulation it is the same thing.

Mr. Segal: I thought that might be, because there
257 we could specify that it was only for purposes of argument on this question.

The Court: Either way, it makes no difference.

Mr. Segal: I could do it either way, but I should think the government might object to the admissions procedure.

The Court: All right, whichever the government would prefer.

Mr. Meade: Wait a minute. What do they mean by "for purposes of argument on this motion"?

The Court: What do you mean?

Mr. Meade: Well, does that mean if you deny the government's motion then you have to hear evidence on these same facts?

The Court: If it is limited, certainly you do. If it is limited for the purpose of this motion.

Mr. Meade: I don't think the government is limiting it that severely.

Mr. Segal: If they aren't, fine. If they are, then I don't see very much that you gain from arguing it.

Mr. Meade: That is what I mean. Don't these defenses get disposed of one way or the other? Either the
258 government wins or loses on these defenses by reason of the stipulations.

Mr. Mullinix: You don't mean the government wins or loses the case, do you?

Mr. Meade: Not the case, no. No, just these defenses. They are either out or they are in; they are either good defenses or they are not good, after this is argued.

Mr. Hollander: The only danger we see, Your Honor, is that we might be bound by admitting now that the Commission had everything before it that is in this case. We might be bound against introducing other evidence in the trial that we have that they didn't have. That is why we want to admit it for the purposes of this argument, so that Mr. Segal has what he wants in order to argue this motion.

Mr. Meade: Well, I didn't think you admitted they had all the evidence. I thought you were talking about all the issues.

The Court: No, Bert, but I don't think it makes too much difference. Suppose I rule regardless of whether the Commission had all the facts or part of the facts or no
259 facts; without any difference I rule that their action was of not effect as far as this proceeding is concerned. Isn't that about all you want? I mean, I would exclude evidence then.

Mr. Meade: That is right. It wouldn't make any difference. You are right, sir.

The Court: If anybody offered any evidence I would simply rule it out. I would say, "That has been decided." So I don't think it makes any difference whether they stipulate for the purpose of this particular motion or not.

Mr. Hollander: Yes, sir.

Mr. Segal: We will do it either by stipulation or admissions. We will consider both and we will talk with Mr. Hollander about it, too, before we send it over.

The Court: It doesn't make any difference.

Then I think that probably should be submitted to me before we have another meeting, because I would like to get an idea of what is material and what isn't. As a matter of fact, you may find that you don't want many facts in addition to these admissions.

Mr. Hollander: Could we set up a timetable now, Your Honor, so that we would know that within a month, we will say, we will come back and do this again, and have
260 this argument:

The Court: Do you mean as far as I am concerned?

Mr. Hollander: Yes, sir.

(Discussion off the record.)

Mr. Segal: As far as the case is concerned, Judge, nothing is being delayed by this being argued in the fall rather than now. There isn't any work that anyone is doing that I know of which will be useless, however you decide this case. There is nothing scheduled during the summer. You have a very big question for determination before you,

namely, the question of the Grand Jury minutes which we have argued, and which you have briefs on.

The Court: Yes. Of course, if we could just get this preliminary stuff out of the way, this matter of what facts are necessary to incorporate into a stipulation in view of these admissions.

Mr. Segal: I would do that before I left, Judge. The only thing I couldn't get to is the actual argument on the merits.

The Court: Oh, that will go a long way, if you can do that before you leave.

261 Mr. Segal: That I would certainly plan to do before I left.

The Court: I think that is really all the government can ask.

Mr. Segal: Further than that, I feel as to that I could do enough of that before I left so that discussions as to it could continue in my absence.

The Court: That is fine.

Mr. Segal: The only thing I am asking about is when it is ripe for argument, I am sure the clients would want me to be here.

The Court: Oh, certainly. You can absolutely count on that.

Mr. Segal: But the rest of it I would say can certainly go on in my absence as if I were here.

The Court: All right. If you can get this preliminary clearing of the underbrush out of the way somehow, so that we can pass on it and be ready to argue the thing in the fall, that would be making very rapid progress.

Mr. Segal: That we can do.

The Court: Nobody can complain about that.

Mr. Hollander: Could I take just a moment to go over the status of the pretrial discovery, so that you know where we stand now?

262 The Court: Yes, sure.

Mr. Hollander: First of all, as you remember, on January 15, defendants filed interrogatories, served them on us. We have completed answering those on May 21

1957, with the exception of a few documents that we found after we had made our final submission, which I now give to Mr. Segal.

Mr. Segal: Thank you.

Mr. Hollander: That completes our answers to the interrogatories and our production, except that Mr. Mullinix has to inspect some documents which are in Philadelphia and awaiting his inspection. As soon as he designates which he wants, they will have those. So that that completes, as far as the government is concerned, our part of production, we believe, except for the Grand Jury transcript, which you have not ruled on.

Mr. Mullinix: Plus one thing, if I may interject this for the sake of completeness. After the matter of the physical submission of documents has been completed, you still have the obligation to give us in your answer to the interrogatory relating to documents a list of those being withheld.

263 Mr. Hollander: That you are going to get right now.

Mr. Mullinix: I didn't say that critically, just for the sake of accuracy.

Mr. Hollander: No, no. I am glad you reminded me.

This is a letter to Mr. Segal which outlines a description of what we have not produced, as Your Honor suggested at the last meeting.

Mr. Meade: One point. We could find it, of course, by somebody going through a lot of answers, but was the government asked or have they stated anywhere which witnesses they intend to use?

Mr. Hollander: Yes, Mr. Meade.

Mr. Meade: Which witnesses they intend to use, as distinguished from witnesses who have knowledge of things.

Mr. Hollander: We have not listed the witnesses we intend to use at trial, except insofar as we have named all the witnesses in the answers to the interrogatories who at the present time we know of that we would probably call. We haven't narrowed that to a trial list.

The Court: That might have a bearing on the
264 Grand Jury proposition, too. If we know who was before the Grand Jury and how many of them you are not going to call——

Mr. Hollander: As you recall, Your Honor, we told defendants who were before the Grand Jury. We put it in our brief the last time.

The Court: But we don't know which ones of those, if any or all, you are going to use.

Mr. Hollander: That is correct, Your Honor.

Are you thinking in terms of the Jencks problem?

The Court: Yes. And of course we can't insist that you do that. I mean, nobody can insist if you really aren't ready to say.

Mr. Hollander: Well, we certainly know a large number. I think we could give them practically the list now, if they wish, sir.

Mr. Segal: I think that would be very helpful. As you say, I think it would be helpful to a determination of that question.

The Court: Oh, yes.

All right, you finish your statement, Mr. Hollander.

265 Mr. Hollander: Now, nothing has been produced by the defendants under our motion to produce. And the depositions which defendant noticed on January 24, 1957, are up in the air. There has been no date set for them.

As far as the government's plans for depositions are concerned, we don't anticipate any depositions. If there are any there would be one or two days at the most involved. So as far as we are concerned, we are ready and waiting.

Mr. Segal: Well, as far as the production, I will let Mr. Mullinix talk about that because he has been in touch with you on it and I think has kept you advised of what he is doing.

Mr. Hollander: Correct.

Mr. Segal: We did produce how many hundred docu-

ments, which were the subject of your first request and which you have in connection with the Grand Jury?

Mr. Hollander: I would say four hundred-odd, last summer, that is correct.

Mr. Segal: I don't want the Judge to get the impression that you have nothing out of our files. You have almost everything.

266 Mr. Hollander: I think Your Honor knew that. What I was referring to was our motion under Rule 34 which was argued at our last meeting.

Mr. Mullinix: That is right, and as Mr. Hollander knows from discussions he has had with me, our work is proceeding on that and we expect to have the material ready for the government within I would think a matter of days.

Mr. Hollander: Fine.

The Court: Now, may I ask you a question or two about the Grand Jury situation. That is ready for disposition by me, is it?

Mr. Hollander: Yes, sir.

The Court: At the present time.

Mr. Hollander: That was argued.

The Court: What about that Rosenberg case that just came down from the Court of Appeals? Haven't they decided that question?

Mr. Hollander: I am afraid I am not familiar with the case.

Mr. Mullinix: I am not either, Judge.

Our Court of Appeals, Judge?

267 The Court: Yes. It came down yesterday, I think, or the day before yesterday.

Mr. Segal: I haven't seen that.

Mr. Meade: It is a pretty close case.

Mr. Mullinix: I guess they just don't inform us of what they decide as fast as they inform you, Judge. I will check it.

Mr. Meade: How about this, though, as a practical matter. Argument on these defenses is going to be delayed until fall. Is there any advantage to anybody to have the Grand Jury question decided now? You have the

P & G case going up. I'm not saying let's have an indefinite delay, I just wonder who will receive an advantage from a prompt decision.

Mr. Segal: Bert, let me say this, we are going to be put eventually to the question of depositions if we are denied the Grand Jury minutes. If we are not denied them——

The Court: I wish you would look at that Rosenberg case and just see whether that doesn't practically foreclose for this Circuit the question and direct the production of the minutes.

Mr. Segal: We will certainly look at that.

268 Mr. Meade: It doesn't go much farther than the the Jencks case, though, sir, only extending it to Grand Jury minutes.

Mr. Hollander: In a criminal case?

The Court: Yes. It extended to the Grand Jury minutes.

Mr. Meade: Of witnesses called.

Mr. Hollander: As we pointed out in our argument last time, Your Honor, of course for impeachment of witnesses the government has used Grand Jury and unfrozen Grand Jury minutes in the past. But this, of course, is not a criminal case.

The Court: Here it is, gentlemen.

(The opinion of the Court was read by Judge Kirkpatrick.)

Mr. Hollander: We would point out that that is a trial in a criminal matter and it is not quite clear, if I understood you—I mean, we can't tell from that opinion whether it is based on the fact that there is an FBI report involved, too, as well as a Grand Jury transcript.

The Court: Yes.

Mr. Segal: I should think if they required production of both that the presence of either would have

269 been sufficient.

The Court: Well, there it is.

Mr. Hollander: We will have to look at that, too.

Mr. Segal: We will all look at the record in that case, I am sure.

The Court: That was filed June 26.

Mr. Segal: I suppose you wouldn't mind if both sides submit their views on that decision to you?

The Court: Oh, yes, I should have them.

(Discussion off the record.)

Mr. Segal: To answer your question directly, Bert, certainly I am not going to be here to take depositions during the summer, and it seems quite clear from the position of this case that it is going to be one of the very first considered by the Supreme Court, so that if we get——

The Court: Which case, the P & G case?

Mr. Segal: The P & G case. So if we get to the issues to be argued, which the Judge will have before him, I doubt whether there is going to be very much delay.

The Court: If this Rosenberg case is what it seems
270 to be, I don't believe there is much for me to do on that.

Mr. Hollander: The Grand Jury took four days, if that they be given the Grand Jury transcript.

The Court: No, it doesn't say that.

Mr. Hollander: So that their taking of depositions wouldn't have anything to do with that, would it, Your Honor?

Mr. Mullinix: It seems to me to if you apply the rationale of this civil to criminal.

Mr. Meade: It is also a question of whether they get the whole thing or just the witnesses who are going to be used. That might be important on the depositions.

The Court: Oh, yes. That is why I was asking.

Mr. Meade: How long would your depositions take?

Mr. Segal: They would be very exhaustive. They are the whole case.

Mr. Hollander: That wouldn't require before trial that helps any.

Mr. Segal: I don't know that they were four days in their entirety.

271 Mr. Hollander: That is correct, they were.

Mr. Segal: Our people were before them what, three days?

Mr. Hollander: Two days.

Mr. Segal: One of the big questions that is—well, I don't want to get into it now. We have argued it at length and you have the briefs.

The Court: All right. Now, what else is there for us to do today?

Mr. Hollander: Do you want to talk at all about the documents that we have produced or the privileges we have asserted?

Mr. Segal: No, because we aren't through with them.

Mr. Hollander: I meant the letter which we gave you, if you want to talk about that. I don't know.

Mr. Segal: No, why don't you let us study that and we will be in touch with you.

On pretrial, subject to our unhappiness with the completeness of some of the answers to the interrogatories, the government and we have I think very good liaison in getting things done.

272 Mr. Hollander: On the jurisdiction matter, Your Honor, can we set up a timetable now, so that we know how soon we are going to get from Mr. Segal his proposed stipulation through you, so that we can get that done and finished before he goes away?

Mr. Segal: I would say within a couple of weeks they ought to have it. I will have to do my part of it within the next ten days.

The Court: All right, make it two weeks. Then at that time you will send it to me, I will go over it, and if I want to get the rest of you together I can do it. We have talked it over pretty fully and it may be that I can without further discussion just decide how much of it is necessary.

Mr. Meade: Do you want to decide that before the government even sees it? They might just sign it.

The Court: Yes, I think you are right.

Mr. Segal: We will give it to the Judge simultaneously and then between us we will advise him how the parties feel about it.

The Court: Yes, that is all right.

Mr. Hollander: We will have our reply within two weeks after Mr. Segal gets his in.

273 Mr. McKay: That you will supply to the Court and to us two weeks after we serve ours.

The Court: Yes, that is fine. All right.

(Discussion off the record.)

274 Reporter's Certificate to foregoing transcript omitted in printing.

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275 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 21,743

(Title omitted)

Stipulation — Approved August 1, 1957

The parties hereby stipulate to the following statement for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein, and for no other purpose, and stipulate that nothing contained in this stipulation shall be used asu a basis for objection to the introduction of evidence at any trial of this action:

1. On May 16, 1955, National Broadcasting Company, Inc. ("NBC") entered into a written agreement with Westinghouse Broadcasting Company, Inc. ("WBC") under which, subject to the approval of the Federal Communications Commission ("FCC"), WBC would acquire the television and radio broadcasting facilities owned and operated by NBC in Cleveland, Ohio, NBC would acquire the television and radio broadcasting facilities owned and operated by WBC in Philadelphia, Pennsylvania, and NBC would pay WBC $3,000,000. This is the agreement referred to in paragraph 21 of plaintiff's complaint. A copy of the agreement is attached to this stipulation as Exhibit A.

276 2. Before the agreement referred to in the preceding paragraph could be consummated, WBC and NBC were required by the Communications Act of 1934

(the "Act") to obtain approval of the proposed exchange from the FCC. Applications for such approval had to be filed with the FCC in a prescribed form setting forth detailed information, including the terms of the transaction and each party's reasons for requesting the transfer. Both parties filed such applications for FCC approval of the exchange on June 15, 1955.

3. Upon the filing of the applications, the FCC instituted a proceeding (hereinafter referred to as the "exchange proceeding"). During the course of the exchange proceeding the FCC conducted an extensive investigation of the proposed exchange and of the negotiations leading to it, including interviews with all WBC and NBC officials involved in the transaction, and others, and a detailed examination of the files, records and other relevant material, and complete reports of the investigation were prepared.

4. On August 12, 1955, the FCC notified the Department of Justice, Antitrust Division, that the WBC and NBC applications for approval of the exchange were pending before the FCC and that possible antitrust questions were raised by these applications.

5. On October 17, 1955, the FCC issued letters, pursuant to Section 309(b) of the Act, to WBC and NBC stating the various issues, including the antitrust isues, which
277 the FCC believed were raised by the applications and as to which the parties were requested to furnish additional information. Three of the seven members of the FCC, favoring immediate grant of the applications, voted against issuance of the letters. The majority, however, felt that the applications should not be approved without further information.

6. On November 16, 1955, WBC and NBC each filed answers to the FCC's 309(b) letters, furnishing detailed data. In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

7. In considering and acting on the exchange applications, the FCC had before it the detailed information contained in the applications, the results of its extensive investigation and analysis, and the information contained in the lengthy and detailed answers by WBC and NBC to the 309(b) letters. The FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action.

8. In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws.

9. The FCC decided all issues relating to the exchange which it could lawfully decide.

278 10. On December 21, 1955, the FCC granted the exchange applications. Its action was a valid exercise of its jurisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies. A copy of the public notice of the FCC action, issued December 28, 1955, including the separate statement of Commissioner Doerfer and the dissenting statement of Commissioner Bartley, is attached to this stipulation as Exhibit B.

11. Following the original notification to the Department of Justice on August 12, 1955 of the pendency of the exchange applications, the FCC and the Department of Justice conferred and exchanged information relating to the exchange, and the FCC kept the Department of Justice fully informed as to the evidence in the FCC's possession relating to the exchange and the status of the applications.

12. In the exchange proceeding, the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At no time

did the Department of Justice exercise any of these rights.

279 13. On January 22, 1956, acting in reliance on the FCC's determination, WBC and NBC effected the exchange as approved and authorized by the FCC.

/s/ BERNARD M. HOLLANDER
Bernard M. Hollander,
/s/ RAYMOND M. CARLSON
Raymond M. Carlson,
Attorneys, Department of Justice,
Attorneys for plaintiff.
BERNARD G. SEGAL,
EDWARD W. MULLINIX,

By /s/ EDWARD W. MULLINIX
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Attorneys for defendants.

Approved this 1st day of August 1957.
/s/ WILLIAM H. KIRKPATRICK
Ch. J.

Exhibit "A"

280 AGREEMENT

AGREEMENT made this 16th day of May, 1955, by and between WESTINGHOUSE BROADCASTING COMPANY, INC., an Indiana corporation (hereinafter referred to as "Westinghouse"), and NATIONAL BROADCASTING COMPANY, INC., a Delaware corporation (hereinafter referred to as "NBC")

WITNESSETH:

WHEREAS, Westinghouse owns and operates Standard Broadcast Station KYW and related authorizations in Philadelphia, Pennsylvania, under licenses duly granted by the Federal Communications Commission (hereinafter referred to as the "Commission"), and NBC owns and operates Standard Broadcast Station WTAM, Frequency Modulation Station WTAM-FM, and related authorizations

in Cleveland, Ohio, under licenses duly granted by the Commission; and

WHEREAS, Westinghouse and NBC desire to exchange such stations and their respective properties; and

WHEREAS, Westinghouse owns and operates Television Station WPTZ and related authorizations in Philadelphia, Pennsylvania, under licenses duly granted by the Commission, and NBC owns and operates Television Station WNBK and related authorizations in Cleveland, Ohio, under licenses duly granted by the Commission; and

281 WHEREAS, Westinghouse and NBC desire to exchange such television stations and their respective properties; and

WHEREAS, Westinghouse represents that the real and personal properties, equipment and facilities which constituted Station KYW as of May 1, 1955, and all the contracts and agreements entered into before May 1, 1955, in connection with the operation of such station and in force and effect on such date are listed and described in Exhibit A hereto (such properties, equipment, facilities and contracts being hereinafter referred to as the "KYW Properties"); and

WHEREAS, NBC represents that the real and personal properties, equipment and facilities which constituted Stations WTAM and WTAM-FM as of May 1, 1955, and all the contracts and agreements entered into before May 1, 1955 (except contracts which are not to be assumed by Westinghouse), in connection with the operation of such stations and in force and effect on such date are listed and described in Exhibit B hereto (such properties, equipment, facilities and contracts being hereinafter referred to as the "WTAM Properties"); and

WHEREAS, Westinghouse represents that the real and personal properties, equipment and facilities which constituted Television Station WPTZ as of May 1, 1955,

282 and all the contracts and agreements entered into before May 1, 1955, in connection with the operation of such station and in force and effect on such date are listed and described in Exhibit C hereto (such properties,

equipment, facilities and contracts being hereinafter referred to as the "WPTZ Properties"); and

WHEREAS, NBC represents that the real and personal properties, equipment and facilities which constituted Television Station WNBK as of May 1, 1955, and all the contracts and agreements entered into before May 1, 1955 (except contracts which are not to be assumed by Westinghouse), in connection with the operation of such station and in force and effect on such date are listed and described in Exhibit D heretc (such properties, equipment, facilities and contracts being hereinafter referred to as the "WNBK Properties");

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto agree as follows:

1. In exchange for the transfer by NBC to Westinghouse of the WTAM Properties, Westinghouse hereby agrees to transfer the KYW Properties to NBC.

2. In exchange for the transfer by Westinghouse to NBC of the KYW Properties, NBC hereby agrees to transfer the WTAM Properties to Westinghouse.

283 3. In exchange for the transfer by NBC to Westinghouse of the WNBK Properties and payment of $3,000,000 in cash, Westinghouse hereby agrees to transfer the WPTZ Properties to NBC.

4. In exchange for the transfer by Westinghouse to NBC of the WPTZ Properties, NBC hereby agrees to transfer the WNBK Properties to Westinghouse and to pay $3,000,000 to Westinghouse.

5. (a) The exchanges shall take place at the office of NBC in New York City, New York, at 10 o'clock A.M., on the first business day of the calendar month next following the receipt of consents from the Commission referred to in Section 15(a) hereof or such later date as may be mutually agreed to by Westinghouse and NBC. The time so fixed is herein referred to as the "time of closing" and the day so fixed is herein referred to as the "day of closing."

(b) At the time of closing, Westinghouse shall deliver to NBC such deeds, bills of sale, endorsements, assignments and other good and sufficient instruments of transfer and conveyance as in the opinion of NBC's counsel shall be effective to vest in NBC good and marketable title to the KYW Properties and to the WPTZ Properties, and NBC will deliver to Westinghouse its certified check in the sum of $3,000,000, payable to the order of Westinghouse and representing New York Clearing House funds, and such deeds, bills of sale, endorsements, assignments and other good and sufficient instruments of transfer and conveyance as in the opinion of Westinghouse's counsel shall be effective to vest in Westinghouse good and marketable title to the WTAM Properties and to the WNBK Properties. For the purposes of the exchanges, the respective Properties shall also include such replacements of and additions to the Properties which the parties shall have made between the respective dates of the Exhibits and the time of closing. At the time of closing, Westinghouse and NBS each shall deliver to the other such documents and opinions as the respective counsel for the parties may deem necessary to evidence the authority of the parties hereto to make the conveyances and transfers contemplated hereby.

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(c) At the closing, as part of the respective exchanges provided for in Sections 1 to 4 inclusive hereof, NBC's then existing affiliation agreement with Westinghouse for KYW will be exchanged for an affiliation agreement for WTAM and NBC's then existing affiliation agreement with Westinghouse for WPTZ will be exchanged for an affiliation agreement for WNBK. Except as otherwise provided herein, the terms of the affiliation agreement for WTAM will be the same terms as those contained in the then existing agreement between NBC and Westinghouse for the affiliation of KYW and the terms of the affiliation agreement for WNBK will be the same terms as those contained in the then existing agreement between NBC and Westinghouse for the affiliation of WPTZ. The Network Station Rate for WTAM will be

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$468 per hour for full rate periods and the rates for other periods will be adjusted accordingly. The Network Station Rate for WNBK will be $2,000 per hour for full rate periods and the rates for other periods will be adjusted accordingly. Such affiliation agreements will become effective at midnight upon the day of closing and will continue in effect for a period of 2 years; provided, however, that the original terms of such agreements will in no event extend beyond November 1, 1957.

6. (a) The following expenses incurred in connection with the operation by Westinghouse of the KYW Properties and the WPTZ Properties and by NBC of the WTAM Properties and the WNBK Properties are to be prorated as of midnight next preceding the day of closing, and Westinghouse and NBC each agrees to pay to the other its proportionate amount of such expenses:

Wages and salaries of the employees of the respective stations

Real and personal property taxes applicable to the respective properties

286 Utility expenses applicable to the respective properties

Rents payable under the leases applicable to the respective properties

All other expenses of the type normally prorated in connection with the sale of a business.

(b) All accounts receivable from broadcasting on Stations KYW and WPTZ, after deduction of applicable discounts and commissions, for broadcasts which occur prior to midnight next preceding the day of closing shall belong to Westinghouse, and for broadcasts which occur thereafter shall belong to NBC. All other net accounts receivable from the operation of the KYW Properties and the WPTZ Properties which are accrued during the month in which the time of closing shall occur shall be prorated between Westinghouse and NBC as of midnight next preceding the day of closing, computed on a monthly basis. NBC agrees to bill such accounts receivable and to trans-

mit Westinghouse's pro rata share to it at the end of each month to the extent collected.

(c) All accounts receivable from broadcasting on Stations WTAM and WNBK, after deduction of applicable discounts and commissions, for broadcasts which occur prior to midnight next preceding the day of closing shall belong to NBC, and for broadcasts which occur thereafter shall belong to Westinghouse. All other net
287 accounts receivable from the operation of the WTAM Properties and the WNBK Properties which are accrued during the month in which the time of closing shall occur shall be prorated between NBC and Westinghouse as of midnight next preceding the day of closing, computed on a monthly basis. Westinghouse agrees to bill such accounts receivable and to transmit NBC's pro rata share to it at the end of each month to the extent collected.

7. Westinghouse agrees to pay all transfer and documentary taxes payable in connection with the conveyances, assignments and transfers to NBC of the KYW Properties and the WPTZ Properties and NBC agrees to pay all transfer and documentary taxes payable in connection with the conveyances, assignments and transfers to Westinghouse of the WTAM Properties and the WNBK Properties.

8. Westinghouse and NBC agree to file or cause to be filed, as soon as practicable, applications in proper form with the Commission requesting consent to the assignment of the broadcast licenses and other authorizations contemplated by this agreement and each agrees to use its best efforts to secure and facilitate prompt action by the Commission in connection with such applications.

9. Westinghouse agrees to indemnify and hold harmless NBC against and in respect of any and all liabilities and obligations or claims arising out of the operation by
288 Westinghouse prior to the time of closing of the KYW Properties and/or the WPTZ Properties, or arising at or prior to such time under any of the contracts, agreements or commitments listed in Exhibits A and C hereto.

10. NBC agrees to indemnify and hold harmless Westinghouse against and in respect of any and all liabilities and obligations or claims arising out of the operation by NBC prior to the time of closing of the WTAM Properties and/or the WNBK Properties, or arising at or prior to such time under any of the contracts, agreements or commitments listed in Exhibits B and D hereto.

11. Westinghouse undertakes and agrees to carry out the terms and provisions by NBC to be performed of the contracts, agreements and commitments listed in Exhibits B and D hereto, or entered into after the date hereof and prior to the closing in accordance with Section 14, hereof, and to indemnify and hold NBC free and harmless from any liability under any of such contracts, agreements or commitments arising after the time of closing.

12. NBC undertakes and agrees to carry out the terms and provisions by Westinghouse to be performed of the contracts, agreements and commitments listed in Exhibits A and C hereto, or entered into after the day hereof and prior to the closing in accordance with Section 14
289 hereof, and to indemnify and hold Westinghouse free and harmless from any liability under any of such contracts, agreements or commitments arising after the time of closing.

13. From time to time, whether at or after the time of closing and without further consideration, the parties hereto will execute and deliver each to the other such further instruments of conveyance, assignment and transfer and documents of further assurance and take such other action as may reasonably be requested by the other, in order to carry out and effectuate this agreement. Westinghouse represents and warrants that on May 1, 1955, it had full, complete and unencumbered title to each and every item of real and personal property listed in Exhibits A and C, except as may be stated on such Exhibits. NBC represents and warrants that on May 1, 1955, it had full, complete and unencumbered title to each and every item

of real and personal property listed in Exhibits B and D, except as may be stated in such Exhibits.

14. Until the time of closing, Westinghouse shall have complete control of the operations of the KYW Properties and the WPTZ Properties and NBC shall have complete control of the operations of the WTAM Properties and the WNBK Properties, provided, however, that subject to their obligation to operate the stations in the public
290 interests and to any other requirements of law, Westinghouse and NBC will operate their respective stations and maintain their properties during the period between the date hereof and the time of closing in substantially the same manner in which they are being currently operated and maintained, and with a view to maintaining the good will and reputation of such stations at their present level. Without limiting the generality of the foregoing, both Westinghouse and NBC further agree that between the date hereof and the time of closing, neither will

(a) enter into any contracts which affect the stations or their operations except

(i) contracts of employment which are terminable at will,

(ii) contracts for the sale of time or services which are terminable by the broadcaster within 26 weeks; and

(iii) other contracts entered into in the normal routine operation of the business;

(b) by any act or omission to act, surrender, modify adversely, forfeit or fail to renew on regular terms any licenses or authorizations necessary for the operation of the respective stations or cause the Commission to institute any proceedings for the cancellation or modification of any such licenses or authorizations (except as provided in Section 8 hereof);

(c) sell, agree to sell or otherwise dispose of,
291 except in the normal routine operation of the respective stations, any of the properties used in connection with the operation of such stations, or suffer or permit the creation of any mortgage, lien or other encumbrance on any of such properties;

(d) cancel, modify or in any way encumber any of the contracts, leases or other agreements pertaining to the respective stations or other properties except in the normal routine operation of such station or properties;

(e) fail to repair and maintain, including the acquisition of new equipment, the properties in accordance with good standards of maintenance applicable in the industry and as customarily found in other station or stations of the respective parties and as required in any lease or other contract pertaining thereto, or

(f) fail to carry adequate insurance for the benefit of Westinghouse and NBC, as their respective interests may appear, against fire, storm damage and other hazards, Westinghouse to carry such insurance with respect to the KYW Properties and the WPTZ Properties and NBC to carry such insurance with respect to the WTAM
292 Properties and the WNBK Properties;

provided, however, that nothing herein contained shall prior to the time of closing give to Westinghouse any right to control the programs or operations of the WTAM Properties or the WNBK Properties or to NBC any right to control the programs or operations of the KYW Properties or the WPTZ Properties.

15. The obligations of Westinghouse and of NBC to make the exchanges herein contemplated are subject to the following conditions:

(a) The Commission by final orders shall have consented to the assignment of the broadcast licenses and other authorizations contemplated by this agreement. For the purposes of this agreement, a final order of the Commission is one with respect to which no petition for rehearing, protest or appeal is pending and the time for filing a petition for rehearing, protest or notice of appeal has expired.

(b) All of the representations and warranties set forth herein are true and correct as of the time of closing; since May 1, 1955, and prior to the time of closing, there shall have been no material adverse change in the condition of the KYW Properties, the WPTZ Properties, the WTAM Properties or
293 the WNBK Properties; no contracts other than contracts of the type permitted by Section 14 hereof shall have been entered into since May 1, 1955; at the time of closing there shall be no litigation, proceeding or investigation pending, or to the knowledge of Westinghouse or NBC, as the case may be, threatened, which might result in any material adverse change in the condition of the KYW Properties, the WPTZ Properties, the WTAM Properties or the WNBK Properties or in their operations; and Westinghouse and NBC shall furnish each other on the closing date a certificate signed by one of its Vice Presidents and its Treasurer confirming that the matters covered by this subsection are true and correct as of the time of closing.

(c) Westinghouse shall receive an opinion of counsel, satisfactory to Westinghouse, stating in substance (i) that NBC has transferred to Westinghouse good and marketable title to the WTAM Properties and the WNBK Properties and (ii) this agreement has been duly executed by NBC and is a valid and binding agreement in accordance with its terms.

(d) NBC shall receive an opinion of counsel, satisfactory to NBC, stating in substance (i) that West-

inghouse has transferred to NBC good and marketable title to the KYW Properties and the WPTZ
294 Properties and (ii) this agreement has been duly executed by Westinghouse and is a valid and binding agreement in accordance with its terms. All the representations and warranties of Westinghouse and NBC shall survive the closing and shall be effective regardless of any investigation that may have been or may be made by or on behalf of either party with respect to the representations and warranties of the other.

16. If the Commission shall take action upon the applications referred to in Section 8 hereof but shall by final order refuse to issue orders meeting the requirements of Section 15(a) hereof, then this agreement shall forthwith terminate. This agreement may be terminated in its entirety, by Westinghouse upon notice to NBC or by NBC upon notice to Westinghouse, at any time after December 31, 1956, if the conditions set forth in Section 15 shall not have been fulfilled on or before that date. However, this agreement shall not be terminated pursuant to the foregoing sentence if such conditions are fulfilled before notice of termination pursuant to such sentence.

17. All terms and provisions of this agreement shall be binding upon and inure to the benefit of, and be enforceable by, the respective successors and assigns of
295 Westinghouse and NBC. Westinghouse and NBC represent to and agree with each other that neither Westinghouse nor NBC has paid or is liable for any brokerage fee or commission in connection with the transaction provided for herein.

18. Any notice hereunder shall be sufficiently given if sent by registered mail to the following addresses:

if to Westinghouse, to
Westinghouse Broadcasting Company
Attention of Mr. C. J. Witting, President
40 Wall Street
New York 5, New York

if to NBC, to
National Broadcasting Company, Inc.
Attention of Mr. J. V. Heffernan, Financial Vice President
30 Rockefeller Plaza
New York 20, New York

19. This agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

In Witness Whereof, each of the parties hereto has caused this agreement to be executed by its President
296 or a Vice President and its corporate seal to be affixed hereto and attested by its Secretary of an Assistant Secretary, this 16th day of May, 1955.

Westinghouse Broadcasting Company, Inc.
By /s/ C. J. Witting
President

Attest:
/s/ Albert Olsen
Secretary
[Seal]

National Broadcasting Company, Inc.
By /s/ J. V. Heffernan
Financial Vice President

Attest:
/s/ Paul B. Lynch
Assistant Secretary
[Seal]

297 Exhibit "B"

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

PUBLIC NOTICE 27067

Report No. 2793 BROADCAST ACTIONS December 28, 1955

The Commission en banc, by Commissioners McConnaughey (Chairman), Hyde, Webster, Bartley, Doerfer and Mack, took the following action on Dec. 21:

The Commission en banc, by Commissioners McCONNAUGHEY (Chairman), HYDE, WEBSTER, BARTLEY, DOERFER and MACK, took the following action on Dec. 21:

WTAM, WTAM-FM, WNBK(TV) National B/cg Co., Inc. Cleveland, Ohio	Granted applications for exchange of properties. Involves (1) assignments of licenses of WTAM, WTAM-FM (also CP of latter) and WNBK (TV Channel 3) and CPs of remote pickups KA-4839-40, 5178-81, 5481, 5484, 6026, 5074 and 8746, and KQG-84 and 697, from NBC to Westinghouse (BAL-2061, BAPLH-6, BALCT-25), and (2) assignment of licenses of KYW and WPTZ (TV Channel 3) and auxiliaries KA-4465, 7914, KGC-92-93, from Westinghouse to NBC (BAL-2062, BALCT-26, BALTP-14 and BALTS-7). Exchange in properties involves payment by NBC of $3,000,000 to Westinghouse for WPTZ (TV). Commissioner Bartley issued a dissenting statement. Commissioner Doerfer issued a statement, in which Commissioner Mack concurred. Both statements are attached.
KYW, WPTZ (TV) Westinghouse B/cg Co., Inc. Philadelphia, Pa.	

DISSENTING STATEMENT OF COMMISSIONER BARTLEY

I dissent. I am of the opinion that the Commission should designate these applications for hearing upon appropriate issues, designed to obtain a full and complete disclosure on the record of all facts concerning the questions and matters set forth below, so that the Commission will thereafter have an adequate factual basis upon which to reach a determination as to whether these transfers will, in fact, serve the public interest, convenience and necessity.

On the basis of the information presently before the Commission, and having in mind particularly the staff report of the preliminary inquiry as to the circumstances underlying these proposed transfers, there exist, to me, in this transaction disturbing and unanswered questions of fact and serious deviations from established Commission policy. In addition, it is to be noted that the proposed transfers present some of the very problems concerning network ownership of stations and network affiliation policies and practices which Congress directed the Commission to examine in its overall study of radio and television network broadcasting. A full exploration in a hearing of the circumstances and effects of these transactions would, in my judgment, greatly assist this study in an orderly and economical manner. ome of the more important questions and matters referred to are set forth in brief below.

The degree of concentration of control—in both Am and TV—presented by a grant of these applications exceeds that permitted by the Commission at any other time. This matter was set forth briefly in the Commission's "309(b) letter" to the parties. In addition, the transfers will create a further overlap situation with respect to the Westinghouse stations—in the Pittsburgh-Cleveland area—which did not exist prior to the transfers. Likewise, there must be taken into consideration the fact that the entire matter of concentration of control is here affected by the fact that operation of these stations in the country's most populous areas is proposed to be removed from a non-network owner-

ship and placed in the hands of network ownership and operation.

The facts, as far as we know them now, in this transaction present serious questions as to the desirability and possible legality of the competitive practices
299 followed by the network in obtaining dominance of major broadcast markets. One of the principal purposes of the original network regulations was to break the "stranglehold" which the two major networks had on the broadcast industry and to give the individual licensee a freedom of choice as to network affiliation and choice of programs. These principles would certainly apply in connection with freedom of choice as to the licensee's ownership of stations.

To the extent that the American system of broadcasting is based upon the principle of freedom of competition, and to the extent that it may be deemed that independent stations compete with network stations, the circumstances of the proposed transfers are, to me, strongly parallel with the situation which faced the Supreme Court in the *Paramount case* (334 U.S. 131), when it dealt with the dominant position occupied by the major motion picture companies in distribution and exhibition. Bearing in mind the facts obtained by the staff in the above-mentioned preliminary inquiry, the events which led up to the filing of the applications here at issue are significantly similar to the matters the Supreme Court condemned when it spoke of block-booking, tie-in deals, and forced acquisition of theatres by the strongest elements in the industry.

Consequently, I feel that the following questions with respect to the NBC-Westinghouse transaction must be satisfactorily answered before I can make the affirmative statutory determination that a grant would serve the public interest:

(1) Did the pressure by NBC on Westinghouse to sell the more profitable Philadelphia station for a less profitable Cleveland station—through the threat of removing its network affiliation—constitute duress (see Exhibit 1A of Applications BAL-2061, etc.)?

(2) Did the apparent withholding of the NBC affiliation for Westinghouse's Pittsburgh station—until the Philadelphia-Cleveland "swap" was agreed to—constitute a tie-in arrangement contrary to the public interest? We inquired in our 309(b) letter "whether National Broadcasting Company used its power to grant or withhold network facilities as an instrument to persuade Westinghouse to accept the proposed Philadelphia-Cleveland exchange". I am unable to find any satisfactory answer to this question in the NBC-Westinghouse replies of November 10, 1955.

300

(3) Is the acquisition here by NBC of a preferred competitive position (viz. a network-owned and operated station in Philadelphia) by use of its dominant position and the leverage of network affiliation consistent with the public interest?

(4) Does the replacement of an independent licensed station by a network, in a market where only three VHF channels are allocated, constitute a violation of our network rules regarding the licensing of stations to networks where there are unequal or inadequate facilities available? (Sec. 3.658(f)).

(5) Does the replacement of an independent operator in this major market by a network owned and operated station serve the public interest in terms of availability of that outlet for the listening public and advertising?

(6) What changes will take place in the programming of the AM & TV stations in the Philadelphia area as the result of acquisition of KYW and WPTZ by a major network? Will such changes in programming better serve the interests of the public and local advertisers in the area?

(7) If this transfer is shown to be unrelated to the needs of the public or its interests and solely activated because of the decision of the network to enhance its

competitive position, does this transfer constitute "trafficking in frequencies?"

Another vitally important element in this case is the extent to which our action may effectively preclude other governmental agencies from examining into the circumstances of the transaction whereby Westinghouse gave up its Philadelphia stations to NBC. The Federal Trade Commission has jurisdiction, by virtue of the provi-
301 sions of the Clayton Act, over cases involving the acquisition by one company of a part of the assets of another, if the effect thereof may be substantially to lessen competition. In addition, the Department of Justice has concurrent jurisdiction for the enforcement of anti-trust laws. It appears to me that there is a substantial question whether, once the Commission grants its approval to these transfers, certain provisions of the Clayton Act (viz. 15 U.S.C. Section 18) might prevent Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the anti-trust laws were involved in the circumstances of these transactions. I believe that this is a further serious matter which requires that the Commission hold a hearing in this matter before taking final action.

302 STATEMENT OF COMMISSIONER DOERFER

On June 15, 1955, the National Broadcasting Company, Inc., and Westinghouse Broadcasting Company, Inc., filed applications for the voluntary assignment of one of their respective radio and television broadcasting stations in exchange with the other for another radio and television broadcasting station. Both are multiple owners of radio and television broadcasting stations. The proposed exchange involves the Westinghouse radio and television stations in Philadelphia for the National Broadcasting Company's radio and television stations in Cleveland, Ohio. The National Broadcasting Company, in addition to owning and operating broadcasting stations in various parts of

the country, conducts a network operation. Westinghouse does not. On December 21, 1955, the Commission approved the transfer. During the interim, the staff of the Commission was authorized to conduct an investigation consisting of an examination of the files of each company pertaining to this transaction, interviews with the officers participating in the negotiations leading to the agreement to exchange, and a number of written inquiries submitted under Section 309(b) of the Communications Act of 1934, as amended.

Because of questions raised in the dissenting opinion as to the duties of the Commission in determining whether or not the public interest would be served by this transaction, it is felt necessary to indicate the extent of the Commission's investigation and consideration.

The dissenting opinion strongly urges the necessity for a full hearing upon appropriate issues designed to obtain a complete disclosure on the record of all the views concerning the questions which have been raised. All questions submitted have been answered. A complete disclosure of all relevant facts has been frankly made.

Unless the Commission is of a view that all of the relevant and material facts are not in the possession of the Commission and can be obtained by no other means than a formal hearing, a hearing is not required. Section 310(b) does not require a hearing. A summary of the interviews and the answers to written interrogatories indicates that no question propounded remains unanswered.

303 There is no suggestion or even an intimation that any of the representations made by any person interviewed were untruthful, or that a full and complete disclosure was not made, or that material information was withheld.[1] All that could possibly be achieved by a formal hearing was obtained through the investigatory process. The prime function of a hearing is to determine issues of fact or of law. No conflicts appear either in fact or in the

[1] Misrepresentations to government agents in the course of an investigation within their jurisdiction are subject to the same penalties as perjury in a formal hearing.

law. The matter is ripe for decision. All that remains is application of Commission policy. If additional facts were deemed material, no reason appears why they cannot be obtained by furtherance of the investigatory process. The answers received, as suggested by the staff, appear to be more frank and illuminating than would be the case if pried out of witnesses in the atmosphere of a formal hearing. When the reasons for a formal hearing are not present, no hearing should be required. Administrative law has been woven into American jurisprudence primarily upon the theory that it would provide expeditious handling of matters involving government policy as well as an efficient and economical process of ascertaining the basic facts. Investigation—especially in non-adversary matters—is a useful and efficient tool in the prompt disposition of administrative matters. There is nothing in the record to suggest that the investigational process was not the more efficient and expeditious manner of handling these applications. The real issue is the application of Commission policy and not disputed facts or principles of law.

The dissenting opinion indicates that the transaction presents serious deviations from established Commission policy. An examination of Commission actions indicates that applications in at least 15 cases for transfers have been granted without hearing to multiple owners
304 who have had overlapping services.[2] It is true that

[2] Storer Broadcasting Co., WXEL, Cleveland, Ohio; WJBK-TV, Detroit, Mich.; WSPD-TV, Toledo, Ohio.

Crosley Broadcasting Corp.; WLWT, Cincinnati, Ohio; WLWC, Columbus, Ohio; WLWD, Dayton, Ohio.

General Teleradio, Inc., WOR-TV, New York; WGTH-TV, Hartford, Conn.

CBS, WBBM-TV, Chicago, Ill.; WXIX, Milwaukee, Wis.

Gene Autry, KOOL-TV, Phoenix, Ariz.; KOPO-TV, Tucson, Ariz.

Cincinnati Times Star (Hulbert Taft), WKRC-TV, Cincinnati, Ohio; WTVN, Columbus, Ohio.

Lester E. & Lester L. Cox, KYTV, Springfield, Mo.; KOAM-TV, Pittsburg, Kans.

Gran Theatre Interests, WREX-TV, Rockford, Ill.; WTVW, Milwaukee, Wis.*

John T. Griffin Group, KWTV, Oklahoma City, Okla.; KTVX, Muskogee, Okla.

* WTVW has been sold to Hearst.

only one of these applications involved a network. However, the multiple ownership rule does not militate against a network's owning a number of stations. Although there were many reasons for the adoption of the multiple ownership rule, perhaps one of the best is stated by Commissioner Bartley as follows:

> "As I have stated publicly on several occasions, the reasons for allowing multiple ownership of radio or television stations which impress me are limited primarily to two: namely, the need for station control by networks to originate programs and the needed revenue from operating stations in order to make networking attractive. . . ." (in re Storer Broadcasting Co. 11 Pike & Fischer, RR 475, 476 (1954))

305 Ownership of stations in major networks was considered vital to the success of network operations. This has been the Commission policy. Under it NBC moved to acquire the Philadelphia trading area in place of the Cleveland stations. The NBC's reason for requesting an exchange of these facilities is frankly stated. It is to the effect that the economic health of a company in the network business has been dependent upon profit from some other source. This is the ownership of stations. It is upon such stations that NBC has relied to carry out the important functions which networks perform and broadcasters desire and the public enjoys. It was not possible for NBC to acquire additional VHF stations without exceeding 5. NBC sought instead to exchange a currently owned station for another with greater earning potentials. Neither the multiple ownership rule nor prior Commission

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Horace A. Hildreth, WABI-TV, Bangor, Me.; WMTW, Poland Spring, Me.

Jefferson Standard Life Ins. Co., WFMG-TV, Greensboro, N. C.; WBTV, Charlotte, N. C.; WBTW, Florence, S. C.

T. B. Lanford, KALB-TV, Alexandria, La.; KPLC-TV, Lake Charles, La.

Lee P. Loomis Group, KGLO-TV, Mason City, Ia.; WKBT, LaCrosse, Wis.

WDSU Broadcasting Corp., WDSU-TV, New Orleans, La.; WAFB-TV, Baton Rouge, La.

Steinman Brothers, WLEV-TV, Bethlehem, Pa.; WGAL-TV, Lancaster, Pa.; WDEL-TV, Wilmington, Del.**

** WDEL-TV has been sold to Paul F. Harron.

policy indicates that a company operating a network system should be discriminated against or penalized in the acquisition of broadcasting stations simply because it is a network. Rather than being a serious deviation from Commission policy, the approval of the instant transaction is a consistent application of present rules and prior Commission policy.

The instant approval does not prejudge or prejudice the pending New Britain case. Nor does it preclude any effective action in the Commission's investigation of network ownership or stations and network affiliation policies and practices. Determination of pending applications consistent with prevailing rules or policies should not be unduly delayed pending possible changes of either in the distant future. A different situation would be presented if a change in the rules were imminent or the Commission had reached substantial accord but as yet an unformulated rule making change. But to digress from a policy or rule before all pending adjudicatory or rule making cases have been determined would be to abort the administrative process of efficiently and expeditiously processing matters before them. A hearing in the New Britain case has not begun. There is not even any proposed rule pending with respect to network practices or policies. To withhold processing applications until all of the vague, undefined and diverse opinions of each Commissioner are integrated into a rule or a decision is to graft upon the administrative process interminable delays to the prompt disposition of matters ripe for decision. Admittedly, the administrative process is not bound by a strict rule of *res adjudicata* or *stare decisis* doctrine. A change in rule or policy is
306 always a possibility and should be undertaken when the public interest requires it. But apart from compelling reasons or exceptional situations, sudden changes in policy or of a duly adopted rule are not only unwarranted but frustrate and confuse applicants who because of the large investments involved require some degree of definiteness and a feeling of assurance that capital commitments will not be undermined by sudden and unexpected changes.

Some apprehension has been raised regarding concentration of control of the mass media of communication within the areas under consideration in both AM and TV services. Consummation of the instant transfers does not exceed the "concentration" permitted by the Commission in other approvals. With respect to television in this case, there is no Grade A overlap between Philadelphia and New York, nor between Pittsburgh and Cleveland within the standards provided by Commission rules. Yet in a prior case, Crosley Broadcasting Corporation's television station at Dayton, Ohio (WLWD) was permitted a Grade A overlap with its television station at Cincinnati, Ohio (WLWT). Here the mileage separation was 48 miles compared to 83 miles between Philadelphia and New York and over 100 miles between Pittsburgh and Cleveland. The duopoly rule does not prohibit inconsequential overlap.

With respect to Grade B overlap, fifteen multiple owners of 34 television stations have been granted applications without hearing despite existence of Grade B overlap. Ten of the multiple owned stations have mileage separations shorter than 83 miles.

With respect to concentration of control of the media of mass communication in television services, there are within the Grade B overlap between Philadelphia and New York as many as fourteen competing television services. In the metropolitan area of New York alone there are 7 television stations competing with each other. In Philadelphia there are four (counting Wilmington which holds itself out to serve Philadelphia) with prospects for another. (An additional construction permit was recently issued for a UHF station.)

With respect to AM overlap, the situation is not materially different than what has been previously approved in other cases. See *Allen T. Simmons*, 3RR 1029. Of the total population served by WRCA (N. Y.) and KYW (Philadelphia), only 4.1% during daytime and 3.4% at night receive primary service from both stations. In the *Simmons*
307 case the Commission granted approval with comparable figures of 21.6% and 74.4% for WJR and WHAS, respectively.

Overlap and concentration becomes less significant when diluted with a number of competing services. Within the mv/m contour of the NBC AM stations there are as high as 101 existing stations. Within the metropolitan areas which it serves there are located from 7 to 35 competing stations. Within the overlap between KDKA (Pittsburgh) and WTAM (Cleveland) primary service areas contours there are 50 stations rendering primary service.

Upon a country-wide population basis, NBC will not serve as many people through its owned and operated television stations as does a competing network (ABC). In any event, population in and by itself cannot serve as a reliable guide in determining concentration of control of the media of mass communication. Persons residing in densely populated areas with a choice of four to eight services cannot be regarded as subject to "undue concentration" compared to those in less densely settled areas with but one or at best two services—especially in the absence of a combination ownership of both newspaper and aural radio.

Some concern is also expressed regarding the "legality of the competitive practices followed by the network in obtaining dominance of major broadcast markets." The "principal purpose," it is suggested, "of the original network regulations was to break the strangle hold which two major networks had on the broadcast industry." One of the deterrents to dominance adopted by the Commission at that time was limiting affiliation contracts to two years. The wisdom of any such rule is now being put to test. If NBC had superior bargaining power in the instant case, it was because of the two year limitation. The expiration of the affiliation contract triggered the negotiations which led to the transfer. Experience has shown that the balance of bargaining power shifts from broadcaster to network and vice versa throughout the years. Witness, for example, the present bargaining position in the AM field. The balance appears to be in favor of the independent broadcaster. Admittedly, the networks presently have the upper hand in the field of television. But with the rapid developments in the art, this may soon change. In any event the record

in the instant case does not show any illegal pressure or duress.

308 Duress is generally understood to be the exercise of an unlawful force, physical or psychological, compelling another to do or to forbear doing something. The record does not indicate any exercise of any such unlawful pressure. Nor are any avenues of investigation suggested which would uncover an undisclosed unlawful exercise of force.

The affiliation contract between NBC and Westinghouse in Philadelphia was due to expire October 1, 1955. No law, rule or regulation of the F.C.C. required NBC to renew that affiliation contract. NBC was free to exercise its own business judgment to renew, affiliate with another, delay an affiliation until it negotiated with another station, or refuse any affiliation.

Westinghouse was free to refuse or to negotiate with another television network. In fact, it contemplated negotiations with the ABC network. But in appraising its network desirabilities in the operation of its other television broadcasting stations, it concluded to do business with NBC, But not so with respect to national spot representation. Westinghouse no longer retains NBC as national spot sales representative.

In any event, such decisions are well within the field of business judgment. The tenor of the Federal Communications Act is to leave much of the business activity of broadcasting and programming beyond the pale of regulation. Specifically, it is not subject to common carrier regulation. In the absence of a law, Commission policy, or imminent danger to the public interest, interference with business judgments should not be based upon a popular, as distinguished from a legal, concept of duress or monopoly. It is impossible to read from this record that the board of directors of Westinghouse were intimidated by force or fear.[3] We must take them upon their word that the transfer

[3] Westinghouse Electric Corporation, the parent company of Westinghouse, sponsors TV programs on the Columbia network but not on NBC.

was based upon the exercise of a prudent business judgment.

The same observation can be made with respect to the question concerning "the apparent withholding of the NBC affiliation for Westinghouse's Pittsburgh station—until the Philadelphia-Cleveland 'swap' was agreed to . . ."

309 At the time of initial negotiations with NBC for an affiliation agreement at Pittsburgh, Westinghouse did not own the Pittsburgh station.

In a letter dated November 17, 1954, NBC gave Westinghouse assurance that it would enter into an affiliation agreement upon consummation of the Pittsburgh station purchase from DuMont and approval thereof by the Commission. The purchase was not consummated until December 3, 1954. The agreement to exchange the respective Philadelphia and New York stations was reached in mid November 1954.

The Pittsburgh affiliation negotiation discloses the same type of business judgment exercised by other multiple owners seeking assurance of network affiliation for some or all of their owned stations. A package deal of the same type of service is not the equivalent of a tie-in deal wherein the purchaser undertakes to pay for something he does not want. The Paramount anti-trust case is not apropos. It consisted of a conspiracy amongst several producers and distributors to monopolize and to restrain trade. Price fixing was rampant. But even in that case, the District and Supreme Courts held that producer-defendants had not attempted to monopolize production of motion pictures.

In the instant case there is no scintilla of evidence that NBC conspired with anyone to monopolize production of network or local programs. No price fixing for advertisers is remotely apparent. NBC exercised its superior bargaining position to exchange a smaller market station (Cleveland) for a larger one (Philadelphia).

No suggestion is made that NBC is attempting to keep other networks out of the Philadelphia market or any other market. Nor that it has conspired with anyone to keep independent broadcasters out of the markets under con-

sideration. Even Westinghouse is free to re-enter the Philadelphia market with another network company or as an independent, if it be so advised. No restraint of trade, or attempt to monopolize television services in any of the trading areas involved are discernible in this exchange transaction.

It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies. Specific intent to restrain trade or to
310 monopolize can seldom be spelt out of a single transaction—whether approved by a governmental agency or not. A plan or a scheme generally consists of a pattern of conduct. Such an over-all look is still available to the F.C.C. or any other governmental agency. But in the interim, the processing of pending applications by this Commission should not wait upon speculative actions, decisions or laws of the distant future. The equalization of bargaining power, if it exists at all, rests primarily with other government agencies.

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311 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted)

Notice of Motion to Dismiss or For Summary Judgment — Dated September 16, 1957

TO: Bernard M. Hollander, Esquire,
Raymond M. Carlson, Esquire,
Department of Justice,
Washington 25, D. C.
Attorneys for plaintiff.

Please take notice that at the time fixed by the court, of which you will be notified, the undersigned will move this court, at the United States Court House, 9th and Chestnut Streets, Philadelphia, Pennsylvania, to dismiss the com-

plaint for lack of jurisdiction or, in the alternative, for summary judgment in favor of the defendants based on the third, fourth and fifth defenses set forth in their answer to the complaint herein, on the ground that as to those defenses there is no genuine issue as to any material fact and the defendants are entitled to judgment in their favor as a matter of law.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania,

CAHILL, GORDON, REINDEL & OHL,
63 Wall Street,
New York 5, New York,
Of Counsel.

September 16, 1957

/s/ BERNARD G. SEGAL
Bernard G. Segal,

/s/ EDWARD W. MULLINIX
Edward W. Mullinix,

Attorneys for Radio Corporation of America and National Broadcasting Company, Inc.

312 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 21,743

(Title omitted)

Before HON. WILLIAM H. KIRKPATRICK, Ch. J.
Philadelphia, Pa., November 26, 1957

Transcript of Record

On (1) Plaintiff's Motion for Preliminary Hearing and Determination of Defendants' Third, Fourth and Fifth Defenses and (2) Defendants' Motion to Dismiss or for Summary Judgment.—Filed December 9, 1957.

Appearances

Present: Bernard M. Hollander, Esq., and
Charles L. Whittinghill, Esq.,
Attorneys, Department of Justice,
for the plaintiff.

Schnader, Harrison, Segal & Lewis
by Bernard G. Segal, Esq., and
Edward W. Mullinix, Esq.,
Attorneys for defendants.

313 Mr. Segal: Your Honor, as far as I have been able to discover this action of the Department of Justice in filing this suit is completely without precedent. We have studied all of the cases and we find none which could be regarded as action of this type to produce this result by the government.

This action, as Your Honor knows, concerns the exchange of television and radio stations by which the defendant National Broadcasting Company, which I will refer to as NBC in this argument, exchanged its stations in Cleveland for the stations of Westinghouse Broadcasting in Philadel-

phia. The Federal Communications Commission, the FCC, approved the transaction upon a finding that it was in the public interest.

I don't want to go into the legal arguments now except that preliminarily I should point out to Your Honor that the plaintiff seeks to have this exchange declared illegal, to have NBC's station acquisitions nullified, and to have the FCC's order approving them set aside. This we believe to be the necessary effect of the relief requested.

The acquisitions required the prior approval of the FCC. They received such approval after a consideration, as I shall show by stipulation, of all of the evidence
314 relating to all of the antitrust issues presented by this complaint. Therefore, Your Honor, the plaintiff's claim in this case is based on the assumption that the Commission approved a violation of the antitrust laws, and, indeed, that the Commission implemented its approval of the violation by granting a license to do the very thing which it is now argued is a violation. So the plaintiff in this collateral proceeding asserts that Your Honor can and should on the very same evidence that was before the FCC review the FCC's action and set aside the FCC's action by revoking the broadcasting licenses.

Just in a word the plaintiff's complaint alleges that the station exchange was made in furtherance of a conspiracy between RCA and its wholly-owned subsidiary NBC. They are the sole conspirators. The conspiracy is to use the network power allegedly of NBC to acquire five stations in five of the eight major markets in the country. Presently NBC has them in four. The allegation is that the conspiracy is to acquire in addition a fifth.

I might just say parenthetically to Your Honor that under the FCC regulations no one owner may have more than five VHF, very high frequency, stations. NBC has those five. If it acquired another it would have to be by dropping one and acquiring another. The next thing
315 that the complaint does is it says that the exchange agreement which was expressly approved is itself an unreasonable restraint of trade.

As to the facts, Your Honor, we have no dispute today. I might say, since Your Honor asked about the briefs that were filed by the other side, that they were filed before the stipulation, so that to the extent there is some inconsistency that is, of course, entirely understandable. It was after the government filed its brief that the stipulation was agreed upon. Then came our brief, so that we had the advantage of the stipulation.

To give the facts, I think I could best do that with fairness to both sides and without controversy by reviewing the highlights of the stipulation. We of course put only the salient facts into it. I think both sides would agree that we left out things that either one might have had in if it weren't by joint stipulation.

The written agreement that is the subject of this suit, the exchange between WBC and NBC, Westinghouse and National Broadcasting, was signed May 16, 1955, and it was made subject to the approval of the Federal Communications Commission. Under it Westinghouse was to acquire NBC's Cleveland radio and TV stations, NBC was to acquire Westinghouse's Philadelphia radio and TV
316 stations, and in addition NBC was to pay $3 million, representing the difference in the earning capacity of the stations, to Westinghouse.

The stipulation states that before the agreement could be consummated, Westinghouse and NBC were required by the Communications Act of 1934—hereafter I will refer to that as the Act. That is the over-all regulatory act that Congress has passed to regulate the radio and, as it has been interpreted, the television industry. Upon the filing of the applications by NBC and WBC, the FCC instituted a proceeding, and during the course of the proceeding there was an extensive investigation. I won't burden Your Honor with what it was. Everybody who had anything to do with the case was interviewed and there was a detailed examination of the files and records and relative material, as the stipulation states.

On August 12, 1955—and this is a significant date—the FCC notified the Department of Justice through its Anti-

trust Division, that these applications for approval of the exchange were pending before the FCC and that possibly antitrust questions were raised by the applications; both that they were pending and that there were antitrust questions that were raised.

A couple of months later, on October 17, the FCC
317 issued what in the industry are known as McFarlane letters, pursuant to a section of the Act, an amendment, Section 309(b), in which they stated that there were various issues on which the FCC required further information. The significance I think is that part of the information on which the FCC wanted further data was information pertaining clearly and indubitably, as I shall show, to antitrust issues, showing the address by the Commission to that very question.

A month later both NBC and WBC, National and Westinghouse, filed detailed answers to the questions formulated by the Commission, and in a joint letter asked the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

Now, we have stipulated certain things to which I would like to call Your Honor's attention. One, that the FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action; all of the evidence relating to all of the antitrust issues which this complaint brings to Your Honor's attention. Next, that the FCC decided all the issues relating to the exchange which it could lawfully decide; left no issue undecided that it could lawfully decide.

318 Now, on December 21, 1955, more than six months after the applications were filed, and more than four months after the Department was notified, the FCC granted the applications. We have stipulated this further stipulation, that its action was a valid exercise of its jurisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies.

I think they are the four critical parts of the stipulation that I would like to call to Your Honor's attention expressly. But it is also stipulated that following the original

notification on August 12 by the FCC to the Department that these applications were pending and there were anti-trust issues involved; that the FCC and the Department of Justice conferred and exchanged information, and the FCC kept the Department fully informed as to the evidence in the FCC's possession, and as to all matters relating to the exchange and the status of the applications, kept them informed as to the evidence in the FCC's possession and the status of the applications.

It was further stipulated that in the exchange proceeding before the FCC the Department of Justice had certain rights. It had the right to request as a party that the applications be set for a hearing. That is under an ex-
319 press provision of the Act, Section 309(b). It had the right to request reconsideration of the FCC decision under Section 405 of the Act. It had the right to protest the FCC decision under Section 309(c) of the Act, and it had the right to obtain judicial review of the decision by appeal under Section 402(b) of the Act to the United States Court of Appeals for the District of Columbia. The stipulation says that at no time did the Department of Justice exercise any of these rights.

Finally, the stipulation states that on January 22, 1956, acting in reliance on the FCC's determination, Westinghouse and National Broadcasting effected the exchange.

That is the stipulation, Your Honor, and I think it sets forth the facts adequate for our purpose. The relief requested in the complaint by the government is that the exchange agreement was in restraint of trade, in violation of Section 1 of the Sherman Act; that the FCC's licenses authorizing its acquisition of the Philadelphia stations be revoked, and that Your Honor order the divestiture by NBC of its television and radio stations in Philadelphia.

Now, if Your Honor please, I should like to address myself first to the subject that this Court has no
320 jurisdiction to set aside or annul the action taken pursuant to the authority of the FCC license. A word about the Act itself. The Communications Act of 1934 was adopted as an over-all regulatory plan for the

radio and television industry. It succeeded the Radio Act of 1927, which was adopted at the urgent request of the President to meet what he called the chaotic conditions resulting from the unregulated access to radio frequencies. The courts had held that the power of the Secretary of Commerce was limited, and the President asked for an over-all act to cover the situation.

Mr. Justice Frankfurter has very well stated the purpose of the Act, and so I shall just quote two sentences from his comprehensive opinion in one of the leading cases—there are two that he has written, at least. This is FCC v. Pottsville Broadcasting Co., and it is discussed in our brief, quite toward the end of the brief, in which Mr. Justice Frankfurter said for a unanimous court this:

> ". . . Congress, in order to protect the national interest involved in the new and farreaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. . . ."
>
> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. . . ."

321

In that case and in another one to which I shall refer, NBC v. United States, Mr. Justice Frankfurter reviews the whole wide scope of the Act and shows how really plenary and complete the program was. But of course I won't burden Your Honor with that, except to say that the FCC is given plenary powers to execute and enforce the statute.

I want at the moment to refer to just one section, because it relates to this argument on jurisdiction, and that is the section which is the basis of the stipulation, that the exchange of the stations could not have been made without FCC approval. That section is 310(b) of the Communications Act, and it provides—I am leaving out the inapplicable words—that "no . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of

in any manner, . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby . . ."

322 Now, those words "finding by the Commission that the public interest, convenience, and necessity will be served thereby" are going to figure largely in our discussion here. Congress has delegated to the FCC exclusive jurisdiction over station transfers and acquisitions, and here in the other case of Mr. Justice Frankfurter to which I referred he pretty well says what the touchstone of this finding that the Commission must make is when he says:

> "The Commission was, however, not left at large in performing this duty." (Granting these permits and licenses) "The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'"

Now, there is, of course, an appeal if the FCC should make a mistake. Section 402 is very specific as to where that appeal must go. It specifies one place, and that is the Court of Appeals of the District of Columbia. As I say, we have stipulated that the Department of Justice had that as one of its four recourses in this proceeding.

I might point out parenthetically that that proceeding has at least the benefit that the FCC, whose order is
323 under attack, would be a party to the proceeding. But in any event the cases are clear that that is the exclusive method for testing the validity of an order like the one here involved which the FCC has issued, and the courts have uniformly stricken down attempts to follow any other method.

We cite in our brief a large number of cases to that effect. I will refer to only one because I think it is typical, and also because it is decided by the Court of Appeals of the District, and that is Black River Valley Broadcasts, Inc. v. McNinch, where the plaintiff sued in the District Court

to have an order of the FCC—in that case an order granting a petition for rehearing—declared invalid. It asked the court to issue an injunction against its enforcement. The District Court dismissed for lack of jurisdiction and the Court of Appeals unanimously affirmed in an opinion by Judge Vinson, later the Chief Justice, and I will read just one short sentence from that:

> "'It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

Now, we have said that the Department of Justice
324 had the right to enter that proceeding in any one of various ways, including appeal. Instead of that it comes to this Court and asks this Court not through the Court of Appeals of the District but collaterally it asks this Court to invalidate that order by declaring the exchange invalid and the other remedies that I have referred to requested by the complaint.

Now, there is a direct line of authority which says that this simply can't be done. The cases are myriad. There are just three I would like to refer to because I think everyone would concede that they are the leading cases on the subject. They are all Supreme Court of the United States cases. One is the Lambert Run Coal Company case. In that case a coal company came first to the State Court but it was removed to the District Court to enjoin a railroad from putting into execution a plan for the distributing of coal cars. This was at a time when coal cars were in great scarcity. The District Court granted a preliminary injunction prohibiting the railroad company, at the request of the coal company, from distributing the cars in the manner that it was doing. On appeal the Court of Appeals for the Fourth Circuit reversed, and it did it on two grounds, one,
that the I. C. C. order pursuant to which the railroad
325 was acting was valid, and, second, that the court was without jurisdiction. On that record it went to the

Supreme Court of the United States, and Justice Brandeis pointed out for a unanimous court:

> "... the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and ... the direction should have been to dismiss the bill for want of jurisdiction and without prejudice.... The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges."

As Your Honor knows, the I. C. C. Act provides that you have to go to a three-judge statutory court for any appeal from any order, and the mere fact that they weren't directly attacking the order of the I. C. C. but were rather trying to bar a party from taking action pursuant to that order made no difference, said the court.

The second case which I have selected as being a landmark case is Venner v. Michigan Central Railroad, decided a few years later by the Supreme Court, and the big difference between the two cases is that here the administrative order was permissive and not, as in the Lambert case, mandatory. In this case a minority shareholder
326 sought to enjoin a railroad from issuing certificates to raise money to buy locomotives. The certificates had been authorized—obviously not directed—by the I. C. C. The plaintiff's contention was they were illegal because they were in excess of federal power and they didn't have the authority of the state agencies and therefore the certificates would be invalid. Again in a unanimous opinion the Supreme Court ruled that the lower court had no jurisdiction over the suit—and it worded it in terms of jurisdiction. Because the language is strongly suggestive of the situation here I quote just one short paragraph:

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission."

I point out to Your Honor that there as here they didn't purport to be asking for setting aside of the order.

"While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. . . .
327 That the order is not mandatory, but permissive, makes no difference in this regard."

And I say to Your Honor that that is our precise situation here. The court held that the case should have been dismissed for want of jurisdiction. Justice Holmes' classic statement is quoted again and again in all of these cases, in which he said that companies should not be subjected to two irreconcilable demands—I am paraphrasing it—one by the regulatory agency on the one hand and one by a court in a collateral proceeding on the other. All of these cases make it crystal-clear that no matter what form the suit may take, conduct that is required or permitted by an order of an administrative agency may not be set aside or enjoined except in the manner provided by the statute, the course specified in the statute, the procedure set forth in the statute. And, Your Honor, if the present complaint seeks to do anything it seeks to set aside our action which we took pursuant to the FCC authorization.

There is one thing I ought to mention about these cases, and I can quickly dispose of it. It is true that the United States was not a plaintiff and they were not antitrust cases. Some did involve federal issues. Some of them were State Courts. But they didn't involve the precise situation
328 here of the Department of Justice and an antitrust case. So I refer to just one other case, and that is the Far East Conference v. United States. In that case Mr. Justice Frankfurter in following a case decided 20 years before, the Cunard Steamship case, said, and categorically speaking for the court, that the fact that it is the Federal Government invoking the antitrust laws rather

than a private party does not alter the situation. He said unequivocally that the same considerations apply whoever initiates the action. And certainly regardless of the fact that the Far East Conference case involved an antitrust case. There the Department of Justice was trying to enjoin a dual system of shipping rates. This system had been established by a voluntary association of shipowners, and their cute scheme was they would have two rates, one for those people who didn't agree to use members of the association exclusively for their shipping and the other, a much lower rate, for those who agreed to use them exclusively. That system of rates had not been submitted to and therefore, of course, had not been approved by the Maritime Board.

The Department of Justice alleged that the system violated Sections 1 and 2 of the Sherman Act. If I know anything about the Sherman Act I would certainly think that they do violate it. But the defendants moved
329 to dismiss the complaint on the ground that the court could not consider the issues involved because that matter of rates came within the jurisdiction of the Maritime Board, and the District Court denied that motion.

On appeal, the Supreme Court reversed, and it reversed on the same grounds as in this prior case of United States Navigation v. Cunard Steamship, except that here the government was involved. The Supreme Court said that there was no jurisdiction in the court to act on this because it was within—and there they used the term—primary jurisdiction; the desire for uniformity, the desire for the expertise of the Maritime Board.

I just point out to Your Honor in passing that that is not nearly as strong as a case we have here, because first there the conduct under attack had admittedly not been submitted to or approved by the Maritime Board. As a matter of fact, the dissent took the very strong position that the Maritime Board had no authority to approve it, and there the Deparment of Justice was asserting a claim under the antitrust laws. The court kicked the case out.

I mentioned that this court used the term "primary

jurisdiction." I should say to Your Honor that
330 these courts use different terminologies. Some use the term "administrative finality," some "exhaustion of administrative remedies," but all of them have this common goal to which I have referred, and that is that the action of administrative agencies simply cannot be subjected to collateral attack in the manner that is here.

I suggest to Your Honor that those rules are not only logical rules of law but they make for good government. What possible purpose would there be in delegating to the FCC this plenary power, this exclusive power to grant a license as to whether a transfer should be made, to prevent, as Justice Frankfurter said, monopolistic control, to serve the public interest, convenience and necessity, to get uniformity in a national institution like radio and television, to providing an express procedure for review, and then just blandly saying that any plaintiff, indeed, or the Department of Justice could go to any court of its choice and simply ask that court to set aside the very action taken under the order of the FCC.

The present complaint under these authorities, Your Honor, must be dismissed since it does seek in a collateral proceeding to invalidate and annul the acquisition
331 approved by the Commission. The authorities are unequivocal that if that is to be done there is one court that can do it and in one way.

Now, so much for jurisdiction. I have a second string to our bow. It is really made unnecessary if we prevail in the first, but it is to the effect that the finding upon which the FCC necessarily based its action precludes a holding by Your Honor that that very transaction which the FCC approved violates the Sherman Act.

The case involves one violation, a violation of Section 1 of the Sherman Act. It of course charges a restraint of trade. I am not going to cite at this late date cases to Your Honor for the hornbook rule that the prohibition of Section 1 extends only to unreasonable restraints, and I address myself to the question of whether this Court can

hold in the face of the FCC decision that this is an unreasonable restraint.

In granting the license permitting the transaction, the FCC necessarily found under Section 310(b) that I quoted to Your Honor that the public interest, convenience and necessity would be served by the granting of the application. Therefore, the position of the Department of Justice in this case—and I would like to just pose it cate-
332 gorically for Your Honor, and as graphically as I can—is that although the transaction serves the public interest, convenience and necessity, nevertheless it involves an unreasonable restraint of trade. And then I submit to Your Honor that a transaction which does serve the public interest by definition cannot be unreasonable.

What is unreasonable? The Supreme Court has said again and again that what constitutes an unreasonable restraint of trade must be judged in the light of "the facts peculiar to the business involved." And in another FCC case involving RCA Communications, Incorporated, decided by the Supreme Court of the United States a few years ago, the court said this:

> "What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; . . ."

You can't use the same standard where you have unregulated competition and where you have regulation entrusted to an administrative agency.

> ". . . for reasons we have indicated above,
> 333 what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry."

I suggest to Your Honor in passing that here it is the Federal Communications Commission that has been designated by Congress as the expert on "the facts peculiar to

the business" and on "what competition is and should be." The essential test of the public interest, convenience and necessity which the FCC must apply is, by the courts' decisions, to be applied solely by the FCC, and its findings on that question must be maintained, say the courts, in cases that we have quoted in legion in our brief, if, of course, they aren't arbitrary or contrary to law, or the usual safeguards insofar as findings of an administrative body are concerned.

When Congress gave to the FCC the jurisdiction to determine how many broadcasting licenses should be issued, under what conditions, in what areas, to whom they should be issued, and did so, as the Supreme Court has said, to prevent the monopolistic domination, then the FCC necessarily was charged with the responsibility of
334 refusing any transfer which involved an unreasonable restraint of trade. So that as I leave this point I just want to make the point clear to Your Honor that it is implicit in any finding of public interest by the Commission under the jurisdiction it has that there is no unreasonable restraint.

Now, why do I say that? First, as a matter of logic, and, second, as a matter of reference to a specific provision of the Act, because under the express provisions of the Communications Act, the FCC simply could not approve a transaction which was monopolistic or an unreasonable restraint of trade or was a combination or conspiracy in restraint of trade.

Section 313 of the Communications Act says this:

> "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable . . . to interstate or foreign radio communications."

I might say to Your Honor the word "radio" throughout this Act includes television.

335 "Whenever . . . any licensee shall be found guilty" —now, here is a provision that the government tags onto this in that section—"Whenever . . . any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court . . . may adjudge . . . that the license of such licensee shall . . . be revoked . . . ."

Now, this is the express provision which in the complaint is relied upon for the fact that Your Honor can do the thing that is here requested of you. I suggest that the plaintiff misapprehends the meaning of that Section 313, if the Court please. What Section 313 means is that the FCC may not issue any license or authorize any transfer, as it did here, if the effect would be to create a monopoly or an unreasonable restraint. That is what it means by saying that those laws shall apply.

It also means, as far as the Department of Justice goes, that transactions in the industry which are not approved by and are not subject to the jurisdiction of the FCC are of course subject to all of the proscriptions of the anti-trust laws and are subject to suits either by the Department of Justice or by private parties.

336 After our brief was written I thought it might be helpful to give Your Honor a couple of instances of what I mean. We didn't discuss this in the brief, but by way of analogy, suppose the three networks, ABC, CBS and NBC should conspire to fix the rates for advertising. There would be no question whatever that the Department of Justice could come in to restrain that and it could ask Your Honor to exercise the punitive power of revoking the licenses of their own stations that participated in that program.

Or suppose NBC alone entered into an agreement with General Motors, for example—let's assume it is a very important advertiser on NBC—that it would get all of General Motors' business if it would deny to American Motors the use of any facilities of NBC or any of its stations. I take it there would be no doubt there that the Department of Justice could file suit and could ask that a station that participated in that have its license revoked.

I could give Your Honor any number of similar examples. We could reverse the newspaper cases that went to the Supreme Court, where the newspapers denied the right to any advertiser of access to its columns, or juggled the rates if they used other media by saying that
337 suppose in a city in which NBC had a dominant station—I don't think there happens to be any, but suppose there were one—it said that anyone who advertises in the local newspaper will have to pay a higher rate to advertise on the NBC station or will be denied access at all. I have no doubt that the Department of Justice could step in there through its Antitrust Division and bring suit.

But that is a far cry, Your Honor, from doing what the government is endeavoring to do here. And I might say to Your Honor just by way of assurance that the FCC has always concerned itself with the possible unlawful restraints and monopolies in the broadcasting field. We have quoted in our brief, and I won't burden Your Honor with them now, regulations of the FCC. Why, the very requirement that no owner shall have more than five stations is a desire, an objective to prevent monopolistic control. The regulations abound with antitrust considerations. There are numerous cases on this point, but I will refer to just one, because this was decided just this summer. It is the case of In Re Rosenblum, decided by the FCC, and in that case it involved the transfer of a station in Albany, New York, I think an independently-owned station. The FCC ordered a hearing on this issue, whether any exist-
338 ing understandings concerning the network affiliation of Station WROW-TV violate the Sherman Act or the Clayton Act. That is one of the express things on which they ordered a hearing, and it was after the hearing that the Commission granted the license and said these understandings were not "in restraint of trade or otherwise in violation of the antitrust laws." So that it comes belatedly to say now that the FCC doesn't concern itself. First it is obligated by law to concern itself with not granting any license or permit, which license or permit would be a violation of the monopoly provisions or the conspiracy provisions or the restraint-of-trade provisions of the antitrust laws.

The Department says that what we really seek—and these are their exact words—is exemption or immunity from the antitrust laws. Well, of course we don't seek anything like that. What we expressly say is that far from being immune, if the FCC had decided here that the acquisition in Philadelphia of this station would constitute an unreasonable restraint in the Philadelphia area, or would enlarge a monopoly of the NBC, it could have denied the application on that express ground.

339 Now, I think it couldn't have done that because actually NBC's competitive position was poorer than that of the other two stations, because they were in the poorer of the ten or eleven markets, and I think that was developed to Your Honor in another place. But there isn't any question that the FCC had the power, indeed it had the obligation.

The government cites statutes which have a different provision, statutes which say that once a governmental agency has approved an acquisition or a merger, that then the antitrust laws shall not apply. In other words, no suit shall be permitted under the antitrust laws. Then by analogy they say that since that is not done here, that Congress intended something different.

Of course it intended something different. It intended here that the FCC should not grant a permit which violated the antitrust laws, should not grant a permit which constituted an unreasonable restraint. We argue neither exemption nor immunity. We argue coverage. But we say that when the FCC has decided in its jurisdiction with all of the facts pertaining to the antitrust issues before it that this should be granted, that its finding of public interest simply can't later be converted into a finding of an unreasonable restraint.

340 The Court: Well, that transfers the whole enforcement program under the antitrust laws to the FCC in radio and television cases, doesn't it?

Mr. Segal: Not at all, Judge, and that is the difference I want to make. It has no powers of enforcement. It couldn't go out today, for example, and institute a general action against National Broadcasting Company for predatory practices. It couldn't have gone out and instituted an action to enjoin this advertising conspiracy that I men-

tioned to Your Honor. It couldn't have gone out and instituted an action to prevent NBC from barring American Motors from the air or not giving them advertising rights. That is for the Department of Justice.

But where it does have express jurisdiction, namely, in licenses, where the Act says, "You shall be the agency to find whether the public interest does or does not require," and the prevention of monopolistic practices and unreasonable restraints does not justify this, once it makes that decision, that is final. That is what the Lambert case and the Venner case and the Far East case say. But I say to Your Honor categorically that the general enforcement of the antitrust laws lies within the jurisdiction of the Department of Justice through its Antitrust

341 Division, except that carved out from that is that it cannot, when it had a full right to intervene in that proceeding, and after the F. C. C. has expressly authorized the transaction, it cannot step in and on that very evidence —concededly it has no evidence that the FCC didn't have— it can't then come in and say to this Court, "Well, you just say in a collateral proceeding the FCC is wrong."

In our brief, Your Honor, we point out by quotations from a Commissioner's decision and the Section 309(d) letter the full extent to which in this very case, rather than generally, the FCC did address itself to these antitrust considerations, and I think the stipulations all pretty clearly show that so that I will not burden Your Honor with going through those except to say to you that our brief by actual quotation makes crystal-clear that the FCC not only considered, as the stipulation says, but decided the issue of unreasonable restraint, as indeed it had to in making its finding on public interest.

Even the 309(d) letter,—I will quote just that one sentence—asks the parties: "The Commission is also concerned as to whether National Broadcasting Company used its power to grant or withhold network facilities as an instrument . . ."

342 Again they are concerned with the problem of whether the acquisition by National Broadcasting Company ". . . would substantially lessen competition or tend to create a monoply in the broadcasting field contrary to existing law."

In Commissioner Doerfer's opinion, to which reference is made, he said that:

> "No suggestion is made that NBC is attempting to keep other networks out of the Philadelphia market or any other market. Nor that it has conspired with anyone . . . Even Westinghouse is free to re-enter the Philadelphia market with another network company or as an independent, if it be so advised. No restraint of trade, or attempt to monopolize television services in any of the trading areas involved are discernible in this exchange transaction."

I am not going to discuss with you a point we have in our brief, in which we show that the Supreme Court has made clear that even if we assumed here the Court had jurisdiction, that in this situation where the Department sits by and permits a party to spend millions of dollars on a transaction, and permits great changes
343 in personnel and everything that is involved in this type of a widespread change, to sit by fifteen months after it has notice and almost a year after the thing, and then come to the Court without a single new fact, without a single bit of new evidence, and say to this Court, "Now, you grant an injunction undoing the whole thing."

The Court: Now you are talking about general equitable principles.

Mr. Segal: General equitable principles. And we have cited in our brief various cases. The leading one is a case that was participated in by Judge Maris. It was a case in which the Price Control Act expressly said that if there is a violation there shall be an injunction issued, and the Supreme Court said, "No such thing at all."

Throughout our brief we have cited cases which say that the government simply has to be guided by the same principles of equity as any other party, and I submit to Your Honor that if ever there was a case that the government is without equity, even if it had right, this is that case. What do we lawyers do where a regulatory agency is involved? We say, "This agreement shall be subject to the regulatory agency and shall not become
344 effective until the order has become final."

In this case the authority was granted in December

but the parties didn't effectuate it. They waited until the last day for appeal by anybody had expired. What more can a party do when the agency charged with the responsibility for regulating an industry says, "God bless you, this is a fine transaction, it is in the public interest, there is no unreasonable restraint, there is no monopolization. Go on and do your business."

Then we discover a year later that another branch of the government says, "Oh, no. We have no new facts, we have no new theories, the FCC decided all of the antitrust issues, it had all of the evidence before it, but nevertheless we can come in and undo the transaction." If that is equity, Your Honor, then it is a new type of equity.

Entirely apart from equity, under the cases this Court is without jurisdiction to entertain the case. If it had any jurisdiction it couldn't find the unreasonable restraint that is necessary in the face of the finding of public interest by the Commission.

Mr. Hollander: I would like to introduce my associate, Mr. Charles Whittinghill, attorney with the Department of Justice.

345 The Court: Very well.

Mr. Hollander: Briefly, Your Honor, it is the government's position that Mr. Segal's argument and his brief haven't met the point which was raised by this motion and by the motion to dismiss, which is can the clear intent of Congress as expressed in Section 313 of the Communications Act, that the Sherman Act applies to broadcasting, be disregarded in this case in the way in which the defendants wish to disregard it? We say that not only was the intent of Congress clear in the wording but that the legislative history is ample to show that Congress meant exactly what it said, that the courts should enforce the antitrust laws.

In that connection, Your Honor, I would like to read from the Congressional Record of July 1, 1926, which is something that we have found since our brief but which we believe to be relevant to this question.

Mr. Segal: Pardon me, did you give the date of that?

Mr. Hollander: Yes, July 1, 1926. 67 Congressional Record, 69th Congress, First Session, page 12507.

The Court: May I just—

346 Mr. Hollander: That is not referred to in our brief, Your Honor.

The Court: I just wanted to hold you a minute until I ran over Section 313.

Mr. Hollander: It is on page 4 and 5 of our brief, Your Honor.

The Court: I have it. That is the revocation.

Mr. Hollander: It is, first of all, Your Honor, the statement that the antitrust laws apply to broadcasting, and, second, the provision which Mr. Segal wishes to read as excluding this kind of a situation, for some reason unknown to us, that the Court has the power to revoke a license, which I might add is only part of the relief asked for in this Sherman Act case.

The Court: All right, go ahead.

Mr. Hollander: I just wish to refer for a minute to the Congressional Record, Your Honor, where Senator Dill, who was the father of the Radio Act of 1926, which is the predecessor of the Communications Act of 1934, was discussing the very Section 313 which is before the Court here. Senator Borah asked a question, up in the right-hand corner here:

"Mr. President, before this amendment shall

347 be agreed to I wish to ask the Senator in charge of the bill a question which may be pertinent in view of the amendment. Is there anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman antitrust law or controls a monopoly that the commission may pass upon the question?"

Senator Dill answered:

"The bill provides that in case anybody has been convicted under the Sherman antitrust law or any other law relating to monopoly he shall be denied a license; but the bill"—and I wish to emphasize this, Your Honor—"the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."

Turning for just a minute now, Your Honor, to the complaint which has been filed here, Mr. Segal's statement of the facts and the description of the complaint we agree with, but I would just like to point out that he continually refers to the fact that the subject matter of this suit is the exchange transaction. We would like to point out to you that two branches of a cause of action
348 are pointed out here, first, an unlawful combination or conspiracy between NBC, which is a licensee of the Federal Communications Commission, and RCA, which is not a licensee in the broadcasting field; second, we charge, of course, that the contract of exchange and the surrounding circumstances were also an unreasonable restraint of trade under Section 1 of the Sherman Act.

Section 4 of the Sherman Act, Your Honor, vests this Court with jurisdiction in this case. It also charges the Attorney General with bringing cases to prevent and restrain violations of the antitrust laws, as Mr. Segal conceded.

We would point out to you that the relief asked for in this case is relief appropriate to a Sherman Act case. It not only calls for revocation of the license of NBC, which, incidentally, is only one of the parties to the contract in question, it also calls for divestiture of NBC's assets in Philadelphia. It calls for injunctive relief to prevent NBC from using what we believe to be its illegal power in furtherance of the conspiracy, and it also asks that any future acquisitions by NBC in the eight primary markets of the United States be considered by this Court before they are allowed.

349 As I said before, Section 313 makes it clear that the antitrust laws apply to broadcasting. The activities which are here alleged are not, as was the case in the Interstate Commerce Commission Act and the Shipping Act cases cited by Mr. Segal, covered by those acts. They are not made violations of those acts in any way. As we have pointed out in our brief, where Congress has planned to give antitrust exemptions in those industries which are completely regulated it has made it very clear as to how those exemptions shall be granted and it has also placed procedural safeguards around the granting of those exemptions, such as the requirement in the Com-

munications Act itself where it refers to telegraph carriers, that there must be a public hearing, there must be notice to the Attorney-General and various other officials before the Commission can make a finding that in the public interest a merger should be granted under that section, and once that has been done an antitrust exemption applies.

It is our position that Congress having specifically not given any antitrust exemption in the broadcasting sections of this Act, and having specifically said that the Sherman Act applies, could not have meant that any activity
350 which violates the Sherman Act could be exempt from Sherman Act prosecution by the Department of Justice. Furthermore, the FCC as differing from the Interstate Commerce Commission and the Shipping Board can grant no relief such as is being asked in this case.

Consider for a moment what would have happened to the Department of Justice if it had done what Mr. Segal proposes and gone before the Commission. There is only one thing that the Commission is authorized to do, Your Honor. That is either to grant or not to grant the station broadcasting license or the exchange, in this case, of two broadcasting licenses as being in the public interest or not being in the public interest. There is no way in the world that the normal antitrust relief of devestiture or injunctive relief could be obtained from the Commission. And Mr. Segal concedes this when he says that the Department of Justice is charged with the enforcement of the Sherman Act.

Furthermore, in the absence of any clear language by Congress that the Commission was meant to supersede the Department of Justice in this area, there would have to be some repugnancy under the Borden case, 308 U. S. 188, between the provisions of the Communications Act and those of the Sherman Act before there could be
351 raised a question of primary jurisdiction or questions of administrative finality or the conflicts between the Act that Mr. Segal has described to you.

I should like to point out to Your Honor that the power of the Federal Communications Commission to control interstate broadcasting is not disturbed in the least by the Court's retention of jurisdiction to hear antitrust cases and enforce the antitrust law. I should like to refer in this

connection, Your Honor, to a case in the neighboring jurisdiction of New Jersey under the Civil Aeronautics Board Act, Slick v. American Airlines, 107 Fed. Supp. 199 at 210. In the Civil Aeronautics Board Act, Your Honor, there are certain provisions which permit the Civil Aeronautics Board to give relief. There is a provision in the Civil Aeronautics Act, however, identical to Section 414 of the Communications Act. Section 414 of the Communications Act states, as does the Civil Aeronautics Act, "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

With that provision alone in the Civil Aeronautics Act, and nothing like Section 313, which positively states the mandate of Congress that the Sherman Act be applied to broadcasting, Chief Judge Forman found that it was proper for the court to retain jurisdiction to hear a Sherman Act case where there was no relief or no provisions in the Act providing for relief that was asked by the plaintiff.

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We contend, as Mr. Segal concedes, that the FCC cannot enforce the Sherman Act. It is certainly clear from NBC v. The United States, which says exactly that, as cited in our brief, and from other cases, such as Mansfield Journal, that the Commission is not charged with the enforcement of the Sherman Act, and it certainly wasn't intended by Congress, as is obvious from the fact that as the Commission's brief points out to Your Honor this is to be a field in which competition shall prevail. It is inconceivable that nobody was to enforce the Sherman Act, and yet that is the position that the government would be in if you were to find for the defendants at this point.

I should point out that the Federal Communications Commission in its brief takes the same position, and it took the same position in the statements which were made both at the time of the opinion and supplementary to that. Mr. Segal quoted one statement by Commissioner Doerfer in his argument, but he didn't quote the statement which we refer to in our brief, in which Commissioner Doerfer made it clear that he didn't believe that anything that the Commission was doing would preclude the Department of Justice from having another

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look. A similar statement was made by the Chairman of the Commission speaking for the Commission to the Antitrust Subcommittee of the House of Representatives shortly afterwards. The Commission, of course, also in its brief, takes the position that it has no power to enforce the Sherman Act.

Just in passing we might note that the Seatrain case, which is cited in our brief, states that considerable weight should be given to the FCC's decision as to whether or not it had primary jurisdiction in the case.

We feel that the acceptance of the defendants' position as to what Section 313 means—and we think this is the key to the question—would be to repeal the Sherman Act by implication, despite the fact it is clearly Congress' intent that the antitrust laws should apply to broadcasting. This would be contrary to the Borden case, which says that a primary rule of construction of the statutes is that statutes are not repealed by implication. And it was con-
354 sidering there the relationship between the Sherman Act, a broad economic Act, and the Agricultural Marketing Act and the Capper-Volsted Act. Similarly, in the Alkali case, 325 U. S. 196, where the Supreme Court was considering the Webb-Pomerene Act.

The acceptance of Mr. Segal's position as to what 313 means would equate a finding by the Federal Communications Commission that the issuance of a broadcasting license was in the public interest with a finding, as Your Honor suggested, that therefore there could be no violation of the antitrust laws. When Mr. Segal argues that the finding by the Commission is the equivalent of the finding that there could be no unreasonable restraint of trade involved in the merits of this case we think he is going beyond the point to be argued in this motion.

We believe that Mr. Segal's interpretation or the defendants' interpretation of 313 would make the revocation of license provision meaningless in many cases. Mr. Segal pointed out to you that he saw no reason why the revocation of license section wouldn't apply to a conspiracy between General Motors and NBC, but he failed to point out wherein that situation differs from the one at the bench at present, where RCA and NBC are alleged
355 to have such a conspiratorial scheme. We don't find

any justification for the defendants' interpretation of the language as to revocation either in the Act or in the legislative history.

I should point out, Your Honor, that the government's position is that we are not seeking a nullification of the Federal Communications Commission. We are seeking antitrust relief which is recognized and provided for in Section 313, among other things, and also recognized in the Sherman Act.

We don't think that there is any case mentioned by defendants, either in the brief or in argument, where an antitrust cause of action has been thrown out because the District of Columbia Court of Appeals was the only recourse. The cases that were cited, like the McNinch case, involved licensing alone, not antitrust causes, and the Interstate Commerce Commission cases, the common carrier cases and the Shipping Board cases have no relevance to this case.

In our brief we distinguished the case of Far East because there was involved common carriers, a regulatory scheme which encompassed the very activities that were charged in the antitrust complaint, and there
356 were remedies in the Shipping Act for the alleged violations of the Sherman Act. Furthermore, there was no Section 313 in the Shipping Act. There is no Section 313 in the Interstate Commerce Act and there is no Section 313 in the Civil Aeronautics Act. In short, we don't believe that exclusive power to grant licenses is the exclusive power to enforce the antitrust laws.

As to Mr. Segal's argument that in essence it is unfair for one branch of the government to take one position and inequitable for another branch to take another, we would point out that this is what Congress intended and this is what Congress expressed. First, in Section 301 of the Act, Congress tells every broadcaster that he has no vested interest in a license. Second, in Section 313 it tells him—and this is any broadcaster—that if he violates the antitrust laws in any way his license is subject to revocation. So he is on notice that if he violates the antitrust laws he will be subject to court review.

For the reasons that have already been discussed in our brief, Your Honor, we feel that defendants' affirmative

defenses are unsound and should be stricken as legally insufficient, as asked in our motion under Rule 12(d). We feel that we have demonstrated that this Court has
357 jurisdiction under Section 4 of the Sherman Act over the subject matter of the action and that the Communications Act could not and has not deprived this court of that jurisdiction.

The doctrine of administrative finality is not applicable because the complaint does not seek to enjoin, set aside, annul or suspend the FCC's grant of the station exchange. Rather, relief, as has been pointed out, is sought under Section 4 of the Sherman Act and Section 313 of the Communications Act and not by way of judicial review, to which the doctrine of administrative finality is directed. The doctrines of res judicata and collateral estoppel we feel can have no meaning here where there was no issue litigated by the Commission and no issue determined by the Commission, since it had no power to determine whether the Sherman Act was violated or not. Therefore, we feel that the government's position under Rule 12(d) should be granted and defendants' motion to dismiss for lack of jurisdiction should be denied.

The Court: Any reply, Mr. Segal?

Mr. Segal: No, thank you.

The Court: Mr. Hollander,—

Mr. Segal: Your Honor, I have one matter, before you recess, that I would like to just mention.

The Court: Yes, all right.

358 Mr. Hollander: Not pertaining to this argument.

The Court: I was just going to ask Mr. Hollander if I may keep this brief.

Mr. Hollander: Surely.

(Discussion off the record.)

Mr. Segal: Your Honor, while I was boarding with our English brethren abroad, you issued your opinion on our Rule 34 motion to see the Grand Jury minutes. We had debated filing a motion for reargument, which would be unusual in the District Court, and which we would naturally be reluctant to do, because we had supposed that the Proctor & Gamble case would be decided, as all of us had thought it would be, early this Fall.

We have checked on that. The record isn't even up there yet. They are apparently going to hear the substantive and procedural questions at the same time. I just want to be sure that we are free to come back to Your Honor when the Supreme Court decides that case, if anything in that case should dictate differently.

The Court: Oh, surely. All you do is file a petition for reargument, and usually, at least my practice is I treat it as though it were a reargument and go into it pretty fully.

359 Mr. Segal: That is all I had in mind. Thank you.

Reporter's Certificate to foregoing transcript omitted in printing.

360 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action 21743

UNITED STATES OF AMERICA

v.

RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.

Opinion Sur Motion Under Rule 12(d) to Determine the Sufficiency of Certain Defenses—Filed 1-10-58

KIRKPATRICK, CH. J.

On January 22, 1956, National Broadcasting Company (NBC) exchanged its television and radio stations in Cleveland for those of Westinghouse Broadcasting Company (WBC) in Philadelphia. The transaction had been approved by the Federal Communications Commission (FCC) on December 21, 1955, and licenses duly granted. On December 4, 1956, the Government filed the complaint in this case praying that the Court adjudge the exchange agreement to be in violation of Section 1 of the Sharman Act and revoke NBC's license to operate the Philadelphia stations and divest it of its title thereto. The plaintiff has moved under Rule 12(d) for a preliminary determination

of the sufficiency of certain affirmative defenses set forth in the answer. Those defenses, in substance, are (1) that the appeal provided by the statute is the ex-
361 clusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit, (2) that the Commission has determined the issues raised by this complaint, that that determination has become final and is a bar to the present action, under principles akin to res judicata and (3) that the plaintiff has forfeited its right to claim equitable relief by reason of the general equitable principles of laches and estoppel.

All facts relevant to the motion now before the Court have been stipulated.

(1)

Section 402 of the Communications Act (47 U.S.C., Sec. 402) provides for a judicial review of orders of the FCC by an appeal to the Court of Appeals of the District of Columbia. In Black River Valley Broadcasts v. McNinch, 101 F. 2d 235, the Court of Appeals, affirming an order dismissing the complaint in an action involving the Communications Act, brought by a private party, said "It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases." The case did not involve the antitrust laws but the later case of Far East Conf. v. United States, 342 U.S. 570, did. That was an action by the Government to enjoin a discriminatory system of shipping rates established by ocean carriers, mem-
362 bers of the Conference. The regulatory statute involved was the Shipping Act and the administrative body, the Maritime Board, but I cannot see any reason to distinguish the basic considerations involved in that case and the present one. The Supreme Court held that the District Court could not proceed until the subject matter of the complaint had been passed upon by the Maritime Board, and dismissed the complaint, pointing out that if the Board's order should prove favorable to the United States it could be enforced by the District Court in a similar suit initiated later. Actually, the Far East decision,

supra, presents a stronger case in favor of the Court's jurisdiction because there had been no submission of the questions involved to the Maritime Board and the Government was not, as it is in this case, confronted by an adverse ruling of the administrative body having jurisdiction, made after full consideration of the same evidence upon which it relied to support its action in the court. The same result has been reached in a number of other cases in which the reasons advanced by the courts were variously want of jurisdiction (Black River Valley Broadcasts v. McNinch, supra), the doctrines of primary jurisdiction (U.S. v. Western Pacific R. Co., 352 U.S. 59), administrative finality or its equivalent, the exhaustion of administrative remedies (Interstate Nat. Gas Co. v. So. California Gas Co., 209 F. 2d 380), all, however, involving the basis policy of supporting the rulings of administrative agencies against court review otherwise than as provided in
363 the statutes creating the agencies, and of protecting the parties involved against "this type of double jeopardy . . . for the same allegations before two different tribunals." (Conference Report on Amendments to the Communications Act). This policy is so deeply imbedded in the law and the reasons on which it is based are so compelling that it goes far toward resolving any doubt about the appeal being the exclusive remedy in cases like this.

I have considered the plaintiff's argument based on the legislative history of the amendment to Section 311 of the Communications Act. The fact is that Section 311 of the Original Act of 1934 contained a sentence providing that the granting of a license should not estop the United States from proceeding against licensees for violations of the anti-trust laws and that Congress in reenacting the Section in 1952 struck out that sentence. The plaintiff argues that the Act is to be read exactly as though the sentence in question had not been stricken out, basing its position on a statement in the Conference Report that the elimination would be of no significance and that the power of the United States to proceed would not be curtailed or affected. Assuming that a provision, removed from a statute by the Congress, can be continued in full force and effect because a congressional committee thought it was unnecessary surplusage—a somewhat doubtful proposition—it would

seem that what was intended to be conveyed to Congress by the Report was that a grant of a license would
364 not free a licensee from accountability in the courts for subsequent violations of the antitrust laws arising from the misuse of the powers acquired by the license. Unless that was what the Committee meant, its subsequent statement, quoted above, would be wholly inconsistent with the first part of its report. In the light of the statement that the Committee "believes there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals", it would seem that the reason for striking out the sentence in question was that it was feared that it might permit the Government to proceed in cases like the present one to penalize parties for entering into transactions, cleared by the FCC after a consideration by it of all the evidence.*

365 (2)

But even if this Court had jurisdiction of this cause, I do not think it could properly exercise it. The FCC requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the FCC decided all issues relating to the exchange which it could lawfully decide. There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States. Later statements by its chairman, as well as the statements contained in an opinion of one of the commissioners in granting the license, which may be construed to mean that the FCC did not consider that the Government would be precluded from prosecuting, by its decision, cannot affect the outcome.

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* I doubt that the foregoing discussion is of very great value. It seems that it is going rather far afield for a court to apply itself to interpreting a somewhat ambiguous Committee Report rather than reading the statute as written. However, in view of the growing importance which courts appear to be giving to such matters in interpreting statutes, it seemed proper to consider the argument of the plaintiff and of the FCC, based on their views of the legislative history.

In no sense does such a decision operate to oust the courts of jurisdiction nor is any remedy taken away. The Government had a complete remedy by appeal if it deemed the action of the Commission improper. The Antitrust Division was at all times fully apprised of the proceedings and of the facts upon which the Commission acted. The Government did not appeal, and waited for approximately one year before it began the present suit which ad-
366 mittedly is based on nothing which the Commission did not have before it. Under these circumstances, the orderly administration of law requires that this Court dismiss the action, whatever might be proper in other cases where facts are not known to the Commission or where the parties engage in unlawful conduct after the granting of the license.

(3)

But assuming that the Government's contentions up to this point are all correct, there remains a compelling reason why this suit should not be proceeded with. In appealing to the Court's discretion to exercise its equitable jurisdiction, the Government stands in no different position from that of a private individual. It has never been held that the Government is entitled automatically to equitable relief upon a showing that a defendant has committed a violation of the law. In Hecht Co. v. Bowles, 321 U.S. 321, 329, a violation of the Emergency Price Control Act was established. The Supreme Court, however, reversed the Court of Appeals, holding "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances . . . We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the deter-
367 minations of courts of equity.'" and again in Appalachian Coals, Inc., v. U.S., 288 U.S. 344, 377, "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief."

In the present case the parties presented the Commission with full information, received permission for the transfer in a proceeding which covered six months, and consummated the transaction a month thereafter. It may be noted that the Commission's approval was not granted until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features. The consummation of the transaction occurred after the time for appeal from the Commission's order had expired. It involved not only an exchange of millions of dollars worth of property but $3,000,000 in cash, together with extensive changes in personnel, organization and operation procedures. The present suit was not filed until December 1956, and it presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming.

In accordance with Rule 12(d) I make the determination that the Third, Fourth and Fifth defenses are valid and constitute a bar to the prosecution of this suit.

An appropriate order may be submitted.

368 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Defendants*.

Order—January 28, 1958

Now, this 28th day of January, 1958, in accordance with the opinion filed herein on January 10, 1958, this action is hereby dismissed.

KIRKPATRICK,
Ch. J.

369 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil No. 21743

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Defendants*.

Notice of Appeal to the Supreme Court of the United States—Filed February 21, 1958

I

Notice is hereby given that the United States of America, plaintiff in the above-entitled action, hereby appeals to the Supreme Court of the United States from the Final Order of the District Court entered on January 28, 1958, dismissing this action.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

II

The Clerk will please prepare a transcript of the record in this cause, for transmisison to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint filed December 4, 1956, by United States of America;

(b) Interrogatories propounded by defendants to plaintiff, numbers 14, 15, 16, 24, 25, 27, and 31, dated January 15, 1957;

(c) Plaintiff's notice of motion and motion for production of documents under Rule 34, filed March 6, 1957;

370 (d) Answer of defendants Radio Corporation of America and National Broadcasting Company, Inc., filed April 12, 1957;

(e) Plaintiff's answers to defendants' interrogatories numbers 14, 15, 16, 24, and 25, filed April 30, 1957, and numbers 27 and 31, filed May 7, 1957;

(f) Transcript of record of hearing held on May 14, 1957, on plaintiff's objections to interrogatories, plaintiff's motion to produce documents, and defendants' motion to produce documents;

(g) Plaintiff's notice of motion and motion for a preliminary hearing on the third, fourth, and fifth defenses raised by defendants' answer, filed May 31, 1957;

(h) Petition of the Federal Communications Commission for leave to file memorandum of law as *amicus curiae*, and attached memorandum of law, both dated June 18, 1957;

(i) Plaintiff's brief in support of its application for the determination of the sufficiency of defendants' third, fourth, and fifth defenses, filed June 21, 1957;

(j) Transcript of record of pre-trial conference held on June 28, 1957;

(k) Stipulation between parties with attached Exhibit A and Exhibit B, filed August 5, 1957;

(l) Defendants' notice of motion to dismiss or for summary judgment, filed September 16, 1957;

(m) Brief for defendants on (1) plaintiff's motion for preliminary hearing and determination of defendants' third, fourth, and fifth defenses, and (2) defendants' motion to dismiss or for summary judgment, filed October 30, 1957;

(n) Transcript of record of hearing held on November 26, 1957, on (1) plaintiff's motion for preliminary hearing and determination of defendants' third, fourth, and fifth defenses, and (2) defendants' motion to dismiss or for summary judgment;

371 (o) Opinion of Judge Kirkpatrick sur motion under rule 12(d) to determine the sufficiency of certain defenses, filed January 10, 1958;

(p) Order dismissing the action, filed January 28, 1958.

(q) This notice of appeal.

III

The following questions are presented by this appeal:

1. Whether the action of the Federal Communications Commission in approving an exchange of broadcasting licenses precludes the United States from subsequently maintaining a Sherman Act suit charging (a) a conspiracy in restraint of trade which was partially effectuated by a broadcasting station acquisition involved in the license exchange approved by the Commission, and (b) a contract in restraint of trade, namely, the station exchange agreement.

2. If question 1 is answered in the negative, whether the district court further erred in dismissing the action on the ground that, under general equitable principles such as laches and estoppel, the United States in any event was precluded from obtaining relief against the Sherman Act violations charged in the complaint.

DANIEL M. FRIEDMAN
Daniel M. Friedman

BERNARD M. HOLLANDER
Bernard M. Hollander

RAYMOND M. CARLSON
Raymond M. Carlson
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Department of Justice

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372 PROOF OF SERVICE

(omitted in printing)

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373 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

(Title omitted)

Cross-Designation of Record on Appeal to the Supreme Court of the United States—Filed March 13, 1958

The Clerk will please include the following in the transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States:

1. Interrogatory 17 propounded by defendants to plaintiff, dated January 15, 1957; and

2. Plaintiff's answer to defendants' interrogatory 17, filed April 30, 1957.

BERNARD G. SEGAL
Bernard G. Segal,

EDWARD W. MULLINIX
Edward W. Mullinix,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Attorneys for Radio Corporation of America and National Broadcasting Company, Inc.

March 13, 1958.

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374 PROOF OF SERVICE

(omitted in printing)

375A UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA ss:

I, GILBERT W. LUDWIG, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original record in the case of United States of America v. Radio Corporation of America and National Broadcasting Company, Inc., Civil Action No. 21743 (except Pages 216 through 274 and Pages 312 through 359, which are originals), the same now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 28th day of March, A. D. 1958

(SEAL) GILBERT W. LUDWIG
Clerk.

SUPREME COURT OF THE UNITED STATES

No. 943, October Term, 1957

UNITED STATES OF AMERICA, *Appellant*,

v.

RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

Order Noting Probable Jurisdiction—June 16, 1958

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—474317/P.O. 122

In the Supreme Court of the United States

October Term, 1957

United States of America, Appellant,

v.

Radio Corporation of America and National Broadcasting Company, Inc.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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Jurisdictional Statement

J. Lee Rankin,
Solicitor General,

Victor R. Hansen,
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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

UNITED STATES OF AMERICA, APPELLANT,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (App. A, *infra*, pp. 16-22) is reported at 158 F. Supp. 33.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 4, commonly known as the Sherman Act, to prevent and restrain continuing violations of Section 1 of that Act.

The order of the district court dismissing this action was entered on January 28, 1958 (App. B, *infra*, p. 23) and the notice of appeal was filed in that court on February 21, 1958. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

The following decisions sustain the jurisdiction of this Court to review the order on direct appeal in this case: *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371; *United States* v. *Employing Plasterers Association*, 347 U.S. 186; *United States* v. *Employing Lathers Association*, 347 U.S. 198.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to

prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of Sections 310(b), 311 and 313 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 310(b), 311 and 313), are as follows:

Sec. 310(b). No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. * * *.

Sec. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.

Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio ap-

paratus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date of the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission in approving an exchange of broadcasting licenses precludes the United States from subsequently maintaining a Sherman Act suit charging (a) a conspiracy in restraint of trade which was partially effectuated by a broadcasting station acquisition involved in the license exchange approved by the Commission, and (b) a contract in restraint of trade, namely, the station exchange agreement.

2. If question 1 is answered in the negative, whether the district court erred in dismissing the action on the further ground that, under general equitable principles such as laches and estoppel, the United States is precluded from obtaining relief against the Sherman Act violations charged in the complaint.

STATEMENT

On December 21, 1955, the Federal Communications Commission, pursuant to Section 310(b) of the Communications Act of 1934, approved without a hearing an exchange of broadcasting licenses between appellee National Broadcasting Company ("NBC") and Westinghouse Broadcasting Company ("Westinghouse"). The Commission's action became final thirty days thereafter and the stations were exchanged on January 22, 1956.

On December 4, 1956, the United States filed a civil suit under Section 4 of the Sherman Act charging Radio Corporation of America ("RCA") and NBC (its wholly-owned subsidiary), with violating Section 1 of that Act. The complaint alleged (1) that since about March 1954, the defendants had been "continuously" engaged in an unlawful combination or conspiracy to restain trade, and (2) that the station exchange agreement between NBC and Westinghouse was in unreasonable restraint of trade. This combination or conspiracy, it was alleged, consisted of a continuing agreement between RCA and NBC to obtain VHF (very high frequency) television stations for NBC in five of the eight primary markets of the United States (NBC then had such stations in three of those markets), by the unlawful use of NBC's power as a network to grant or withhold network affiliation from

non-network station owners; and that this combination or conspiracy had been "effectuated * * * in part" through NBC's acquisition of Westinghouse's Philadelphia VHF television station. The relief requested was that the court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia station; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets (prayer in complaint; plaintiff's answer to defendants' interrogatory No. 24(c), filed April 30, 1957; transcript of argument on November 26, 1957, p. 37).

In their answer, appellees raised the following affirmative defenses: (1) that the action was barred by the administrative finality of the Commission's action; (2) that the district court lacked jurisdiction over the subject matter of the suit; and (3) that the doctrines of *res judicata* and collateral estoppel precluded the Government from maintaining the action. The Government then moved, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, for a preliminary hearing and determination before trial of the sufficiency of these three defenses.[1]

The parties entered into a stipulation "for the purpose of any determination of the merits of" the three defenses. The stipulation stated, *inter alia*, that after NBC and Westinghouse had filed their applications with the Commission for approval of the station exchange, the Commission notified the Department of Justice that the applications raised possible antitrust

[1] Thereafter, appellees filed a motion to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment in their favor, based on these affirmative defenses.

questions; that the Commission conducted an extensive investigation of the proposed exchange and the negotiations leading to it, and kept the Department of Justice fully informed as to the evidence which it had in respect thereto; that in considering the proposed exchange, the Commission "had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws," and that the Commission "decided all issues relating to the exchange which it could lawfully decide"; that in granting the applications the Commission "had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action"; and that although the Department of Justice had the right to request that the exchange applications be set for hearing, to request re-consideration, to protest the Commission's decision, and to obtain judicial review of the decision by appeal under the Act, it did not "exercise any of these rights."

On January 10, 1958, the district court held that the three affirmative defenses were "valid and constitute a bar to the prosecution of this suit." The court upheld appellees' contention that under Section 402 of the Communications Act, appeal to the Court of Appeals for the District of Columbia Circuit is the "exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit."

It further ruled that, even if it had jurisdiction, it could not "properly exercise it." The court stated that the Commission had before it all the evidence on which the antitrust suit was based; that the Commission was "under a duty to pass upon the issues pre-

sented by this evidence"; and that there was "no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States."

Finally, the court held there was an additional "compelling reason why this suit should not be proceeded with." The court stated that the Commission's approval was not granted until more than four months after the Antitrust Division had been officially notified of the proposed transaction "and alerted for possible antitrust features"; that the transaction was consummated after the time for appeal from the Commission's order had expired and it involved an exchange of millions of dollars worth of property, $3,000,000 in cash, and "extensive changes in personnel, organization and operating procedures"; and that the present suit "presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming."

THE QUESTIONS ARE SUBSTANTIAL

1. The district court held that the action of the Federal Communications Commission in approving an exchange of broadcasting licenses bars the United States from subsequently maintaining a civil suit to enforce the Sherman Act, in which the exchange is challenged both as an unreasonable restraint of trade and as a step in partial effectuation of a broader conspiracy to restrain trade. This novel holding that the Commission thus may provide exemptions from the Sherman Act in the broadcasting field has no support in

either the language or the legislative history of the Communications Act, and is contrary to the settled principles governing the respective jurisdictions of the Commission to enforce the Communications Act and of the district court to enforce the Sherman Act.

In approving the exchange, the Commission acted pursuant to Section 310(b) of the Communications Act, which permits transfers of station licenses only upon a "finding by the Commission that the public interest, convenience, and necessity will be served thereby." Section 313 of the Act (to which the district court did not refer in its opinion) makes applicable to broadcasting "[a]ll laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade"; and it authorizes a district court to revoke a license upon finding, in any suit brought to enforce such laws, that a licensee has violated those laws. Section 311 directs the Commission to refuse a station license to any person whose license has been revoked by a court under Section 313.

The clear purport of these provisions is that although "competition is a relevant factor [for the Commission to consider] in weighing the public interest" (*Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94; see, also, *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33-34 (C.A.D.C.)), it is the courts and not the Commission which have the duty of passing on Sherman Act violations. There is nothing in the Communications Act which indicates that Congress intended that Commission approval of a transaction as in the public interest confers antitrust immunity.

On the contrary, in view of the settled principle that exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U.S. 188; *United States Alkali Export Association* v. *United States*, 325 U.S. 196), the meaning of Section 313 is that, no matter what the Commission may do in performing its regulatory functions, the antitrust laws remain fully applicable to broadcasting, and are to be enforced through district court proceedings. The Communications Act "recognizes that the field of broadcasting is one of free competition" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474) and, as this Court has recognized (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223), the Commission is not charged with "the duty of enforcing" the Sherman Act. Nor does it purport to do so. See *Mansfield Journal* case, *supra*, at 33.

If there were any doubt that Commission action in the broadcasting field does not confer antitrust immunity, it is put to rest by the fact that the provisions in the Communications Act governing consolidations and mergers of telegraph companies specifically provide that if the Commission, after hearing upon notice to the Attorney General and other interested public officials, approves such merger or consolidation as in the public interest, "any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger." Section 222(c)(1), 47 U.S.C. 222 (c)(1). A similar exemption is provided for consolidations of telephone companies which the Commission approves. Section 221(a). There is no comparable grant of immunity, however,

for transactions which the Commission approves in the broadcasting field.

This case, therefore, is significantly different from *Far East Conference* v. *United States*, 342 U.S. 570, on which the district court relied. For there, as in the case of mergers and consolidations of telegraph and telephone companies under the Communications Act, the statute involved (the Shipping Act, 1916) specifically provides an antitrust exemption for agreements approved by the Federal Maritime Board. Furthermore, under the Shipping Act, the Board could provide adequate relief against the dual-rate system which was challenged in *Far East* (see 342 U.S. at 573-574). However, the Federal Communications Commission plainly cannot provide effective relief against the conspiracy charged in the instant case (see *infra*, pp. 12-13).

The court below relied on the fact that the last sentence of Section 311 originally had provided that "The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for * * * a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade * * *," and that this provision was eliminated by the Communications Act Amendments, 1952. The conference report on the amendments, however, states that the elimination of this provision is not "of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law *the power of the United States* or of any private person *to proceed under the antitrust laws*

would not be curtailed or affected in any way." H. Rep. No. 2426, 82nd Cong., 2d Sess. (1952) p. 19 (emphasis added).[2]

There are sound practical reasons which dictate against construing the Commission's approval of the exchange transaction as conferring antitrust immunity. The Commission had before it, and necessarily could approve, only the particular exchange involved. The Government's complaint, on the other hand, also charged a broad and continuing conspiracy, of which the exchange agreement was only one step. One of the defendants in the Government suit (RCA) was not even a party in the Commission proceedings. The Commission could not have granted effective relief against the serious antitrust violations charged in the complaint. For even if the Commission had purported to adjudicate the antitrust violations (which, in the court below, it specifically denied having done), the only relief it could have given in its proceeding was

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[2] The court also relied on the statement in the Senate Committee Report (S. Rep. No. 44, 82nd Cong., 1st Sess. (1951) p. 9) that "there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals." But this statement does not support the court's conclusion that "the reason for striking out the sentence in question was that it was feared that it might permit the Government to proceed in cases like the present one to penalize parties for entering into transactions, cleared by the FCC after a consideration by it of all the evidence." On the contrary, the Senate Report indicates that what the Committee had in mind when it referred to "trial for the same allegations before two different tribunals" was the possibility that the Commission might "revoke the license of a person found guilty of antitrust violation if the court itself has not ordered such revocation" (*ibid.*). The Committee specifically pointed out (*ibid.*) that "alleged violations of the antitrust statutes * * * are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government."

to deny the exchange applications. It could not have enjoined the conspiracy. The district court's statement that "[t]he Government had a complete remedy by appeal if it deemed the action of the Commission improper" overlooks the fact that the question on such appeal would be the correctness of the Commission's ruling that the license exchange would serve the "public interest, convenience, and necessity"—a far different question from those involved in the antitrust case. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67. The United States is not seeking in this case to overturn the Commission's approval of the exchange under the standards of the Communications Act, but to obtain effective relief against the Sherman Act violations charged in the complaint.

The short of the matter is that the Commission did not adjudicate whether appellees violated the Sherman Act, and Commission approval of the exchange agreement did not oust the district court of its exclusive statutory jurisdiction "to prevent and restrain" violations of the Sherman Act.

2. As a separate ground for dismissing the action, the district court held that even if it had jurisdiction, the Government was barred under general equitable principles from obtaining relief against the Sherman Act violations charged in the complaint. Relying on the stipulation that all the facts upon which the antitrust complaint is based were known to the Commission when it granted the exchange applications, and on the further fact that the defendants had made extensive operating changes as a result of the exchange, the court concluded that the case "presented no new facts and nothing which the Government had not known for

over a year, and no satisfactory explanation for the delay [in instituting the action] is forthcoming."

But the complaint was not untimely filed, since it charged a conspiracy which continued to the date of filing. The relatively short time which elapsed between the Commission's action and the filing of the complaint (eleven months) cannot operate to bar the Government from obtaining equitable relief against the serious antitrust violations charged in the complaint. Moreover, since the Commission did not purport to adjudicate the antitrust violations, NBC (RCA not having been a party before the agency) cannot fairly contend that it consummated the transaction in reliance on any implied understanding that Commission approval would bar future antitrust proceedings by the United States—proceedings in which, as we have noted, relief is sought not only against the exchange but also against the conspiracy of which it was a part.

This Court has pointed out that a "trial court upon a finding of a conspiracy in restraint of trade * * * has the *duty* to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 88 (emphasis added); see, also, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188. If the Government can prove its charges against appellees, we believe that the trial court would have a clear "duty" to grant appropriate relief, irrespective of the time which elapsed between the Commission's action and the filing of the complaint. Cf. *United States* v. *E. I. du Pont de Nemours*, 353 U.S. 586, where a district court was directed to grant equitable relief against

an antitrust violation involving a transaction consummated thirty-five years earlier. Principles such as "acquiescence, laches, or failure to act", which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. Cf. *United States* v. *California*, 332 U.S. 19, 39-40.

CONCLUSION

The implications of the decision below are far-reaching in their impact upon the enforcement of the antitrust laws in the broadcasting field. We believe that the Communications Act reflects a clear Congressional intent that these laws are fully applicable to the broadcasting industry, and that Commission action cannot confer antitrust immunity. Since the decision below bars the Government from enforcing the Sherman Act against parties who, for the purposes of this appeal, must be assumed to have violated that Act, review by this Court is clearly warranted.

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
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APRIL 1958.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21743

UNITED STATES OF AMERICA,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

Filed: 1-10-58

SUR MOTION UNDER RULE 12(d) TO DETERMINE THE SUFFICIENCY OF CERTAIN DEFENSES

KIRKPATRICK, *Ch. J.*

On January 22, 1956, National Broadcasting Company (NBC) exchanged its television and radio stations in Cleveland for those of Westinghouse Broadcasting Company (WBC) in Philadelphia. The transaction had been approved by the Federal Communications Commission (FCC) on December 21, 1955, and licenses duly granted. On December 4, 1956, the Government filed the complaint in this case praying that the Court adjudge the exchange agreement to be in violation of Section 1 of the Sherman Act and revoke NBC's license to operate the Philadelphia stations and divest it of its title thereto. The plaintiff has moved under Rule 12(d) for a preliminary determination of the sufficiency of certain affirmative defenses set forth in the answer.

Those defenses, in substance, are (1) that the appeal provided by the statute is the exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit, (2) that the Commission has determined the issues raised by this complaint, that that determination has become final and is a bar to the present action, under principles akin to res judicata and (3) that the plaintiff has forfeited its right to claim equitable relief by reason of the general equitable principles of laches and estoppel.

All facts relevant to the motion now before the Court have been stipulated.

(1)

Section 402 of the Communications Act (47 U.S.C., Sec. 402) provides for a judicial review of orders of the FCC by an appeal to the Court of Appeals of the District of Columbia. In Black River Valley Broadcasts v. McNinch, 101 F. 2d 235, the Court of Appeals, affirming an order dismissing the complaint in an action involving the Communications Act, brought by a private party, said "It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases." The case did not involve the antitrust laws but the later case of Far East Conf. v. United States, 342 U.S. 570, did. That was an action by the Government to enjoin a discriminatory system of shipping rates established by ocean carriers, members of the Conference. The regulatory statute involved was the Shipping Act and the administrative body, the Maritime Board, but I cannot see any reason to distinguish the basic considerations involved in that case and the present one. The Supreme Court held that the Dis-

trict Court could not proceed until the subject matter of the complaint had been passed upon by the Maritime Board, and dismissed the complaint, pointing out that if the Board's order should prove favorable to the United States it could be enforced by the District Court in a similar suit initiated later. Actually, the Far East decision, supra, presents a stronger case in favor of the Court's jurisdiction because there had been no submission of the questions involved to the Maritime Board and the Government was not, as it is in this case, confronted by an adverse ruling of the administrative body having jurisdiction, made after full consideration of the same evidence upon which it relied to support its action in the court. The same result has been reached in a number of other cases in which the reasons advanced by the courts were variously want of jurisdiction (Black River Valley Broadcasts v. McNinch, supra), the doctrines of primary jurisdiction (U.S. v. Western Pacific R. Co., 352 U.S. 59), administrative finality or its equivalent, the exhaustion of administrative remedies (Interstate Nat. Gas Co. v. So. California Gas Co., 209 F. 2d 380), all, however, involving the basic policy of supporting the rulings of administrative agencies against court review otherwise than as provided in the statutes creating the agencies, and of protecting the parties involved against "this type of double jeopardy . . . for the same allegations before two different tribunals." (Conference Report on Amendments to the Communications Act). This policy is so deeply imbedded in the law and the reasons on which it is based are so compelling that it goes far toward resolving any doubt about the appeal being the exclusive remedy in cases like this.

I have considered the plaintiff's argument based on the legislative history of the amendment to Section 311 of the Communications Act. The fact is that Section

311 of the original Act of 1934 contained a sentence providing that the granting of a license should not estop the United States from proceeding against licensees for violations of the antitrust laws and that Congress in reenacting the Section in 1952 struck out that sentence. The plaintiff argues that the Act is to be read exactly as though the sentence in question had not been stricken out, basing its position on a statement in the Conference Report that the elimination would be of no significance and that the power of the United States to proceed would not be curtailed or affected. Assuming that a provision, removed from a statute by the Congress, can be continued in full force and effect because a congressional committee thought it was unnecessary surplusage—a somewhat doubtful proposition—it would seem that what was intended to be conveyed to Congress by the Report was that a grant of a licensee would not free a license from accountability in the courts for subsequent violations of the antitrust laws arising from the misuse of the powers acquired by the license. Unless that was what the Committee meant, its subsequent statement, quoted above, would be wholly inconsistent with the first part of its report. In the light of the statement that the Committee "believes there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals", it would seem that the reason for striking out the sentence in question was that it was feared that it might permit the Government to proceed in cases like the present one to penalize parties for entering into transactions, cleared by the FCC after a consideration by it of all the evidence.*

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* I doubt that the foregoing discussion is of very great value. It seems that it is going rather far afield for a court to apply itself to interpreting a somewhat ambiguous Committee Report

(2)

But even if this Court had jurisdiction of this cause, I do not think it could properly exercise it. The FCC requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the FCC decided all issues relating to the exchange which it could lawfully decide. There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States. Later statements by its chairman, as well as the statements contained in an opinion of one of the commissioners in granting the license, which may be construed to mean that the FCC did not consider that the Government would be precluded from prosecuting, by its decision, cannot affect the outcome.

In no sense does such a decision operate to oust the courts of jurisdiction nor is any remedy taken away. The Government had a complete remedy by appeal if it deemed the action of the Commission improper. The Antitrust Division was at all times fully apprised of the proceedings and of the facts upon which the Commission acted. The Government did not appeal, and waited for approximately one year before it began the present suit which admittedly is based on nothing which the Commission did not have before it. Under these circumstances, the orderly administration of law re-

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rather than reading the statute as written. However, in view of the growing importance which courts appear to be giving to such matters in interpreting statutes, it seemed proper to consider the argument of the plaintiff and of the FCC, based on their views of the legislative history.

quires that this Court dismiss the action, whatever might be proper in other cases where facts are not known to the Commission or where the parties engage in unlawful conduct after the granting of the license.

(3)

But assuming that the Government's contentions up to this point are all correct, there remains a compelling reason why this suit should not be proceeded with. In appealing to the Court's discretion to exercise its equitable jurisdiction, the Government stands in no different position from that of a private individual. It has never been held that the Government is entitled automatically to equitable relief upon a showing that a defendant has committed a violation of the law. In Hecht Co. v. Bowles, 321 U.S. 321, 329, a violation of the Emergency Price Control Act was established. The Supreme Court, however, reversed the Court of Appeals, holding "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. . . . We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.'" and again in Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 377, "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief."

In the present case the parties presented the Commission with full information, received permission for the transfer in a proceeding which covered six months, and consummated the transaction a month thereafter. It may be noted that the Commission's approval was not

granted until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features. The consummation of the transaction occurred after the time for appeal from the Commission's order had expired. It involved not only an exchange of millions of dollars worth of property but $3,000,000 in cash, together with extensive changes in personnel, organization and operating procedures. The present suit was not filed until December 1956, and it presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming.

In accordance with Rule 12(d) I make the determination that the Third, Fourth and Fifth defenses are valid and constitute a bar to the prosecution of this suit.

An appropriate order may be submitted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 21,743

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC., DEFENDANTS.

ORDER

Now, this 28th day of January, 1958, in accordance with the opinion filed herein on January 10, 1958, this action is hereby dismissed.

KIRKPATRICK,
Ch. J.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 457608 1958

No. 54

In the Supreme Court of the United States

October Term, 1950

United States of America, appellant

v.

Radio Corporation of America and National Broadcasting Company, Inc.

Appeal from the United States District Court for the Eastern District of Pennsylvania

Supplemental Memorandum for the United States

J. Lee Rankin,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

n the Supreme Court of the United States

OCTOBER TERM, 1957

No. 943

UNITED STATES OF AMERICA, APPELLANT

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Solicitor General respectfully submits to the ourt this memorandum of the Federal Communica-ons Commission, setting forth its views on certain pects of this case which concern the Commission.

J. LEE RANKIN,
Solicitor General.

STATEMENT

The holding of the district court (Juris. St. App., p. 16–21) that the United States is barred from aintaining a civil suit to enforce the Sherman Act 26 Stat. 209, as amended, 15 U. S. C. 1, *et seq.*) prior action of the Federal Communications ommission approving an exchange of broadcasting

licenses pursuant to the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U. S. C., sec. 151 *et seq.*), raises problems of concern to the Commission. This memorandum sets forth the Commission's views as to the nature of its licensing action and the practical difficulties confronting the Commission as a result of the decision of the district court.

The licensing proceeding before the Commission began on June 15, 1955, when National Broadcasting Company (NBC) and Westinghouse Broadcasting Company (Westinghouse) filed applications, pursuant to Section 310 (b) of the Communications Act, seeking Commission consent to an exchange of their respective radio and television stations in Cleveland, Ohio, and Philadelphia, Pennsylvania. The Commission ordered a staff investigation of the proposed exchange to ascertain (1) whether it would involve any substantial overlap of service areas between stations owned by the same party in contravention of Section 3.636 of the Commission's Rules and Regulations (47 C. F. R. Sec. 3.636) and (2) the circumstances which led to the agreement between NBC and Westinghouse. The Commission also informed the Antitrust Division of the Department of Justice of the proposed exchange and subsequently advised the Antitrust Division as to the results of its investigation. On December 21, 1955, the Commission, upon the basis of investigatory reports from its staff and replies of NBC and Westinghouse to letters of inquiry sent out by the Commission pursuant to Section 309 (b) of the Communications Act, approved the exchange. Public notice of this action was given on

December 28, 1955 (FCC Public Notice 27067, Rep. No. 2793).

The foregoing action of the Commission was taken without a hearing and without any majority opinion. One commissioner issued a dissenting opinion in which, *inter alia*, he stated his personal view that "certain provisions of the Clayton Act (*viz.*, 15 U. S. C. Sec. 18) might prevent the Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the antitrust laws were involved in the circumstances of these transactions." Two commissioners among the majority issued a reply statement asserting that "it is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies."

In a subsequent official public statement with respect to the NBC-Westinghouse exchange submitted on June 27, 1956, to the Antitrust Subcommittee of the House Judiciary Committee (Hearings before the Antitrust Subcommittee of the Judiciary Committee of the House of Representatives, 84th Cong., 2d Sess., Part 2, Vol. 1, p. 3181), the chairman of the Commission stated that "while the majority of the Commission decided that granting consent to the transfers would be in the public interest, it did so only on the understanding that it was not foreclosing the Department of Justice from taking appropriate action should it determine that such action was warranted." On December 12, 1956, shortly after the United States instituted the civil antitrust suit against NBC and

Radio Corporation of America (RCA) which is the subject of this appeal, the Commission approved NBC's application to acquire control of another television station in New Britain, Connecticut, on the following condition: "provided, however, that this Order shall be without prejudice to whatever action the Commission may deem appropriate at such time as presently pending antitrust action involving the National Broadcasting Company (transferee) may be terminated." On July 18, 1957, the Commission renewed NBC's licenses for its Philadelphia radio and television stations on the similar condition that such "action is without prejudice to whatever action the Commission may deem appropriate at such time as presently pending anti-trust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated."

On June 18, 1957, the Commission filed with the district court, as *amicus curiae,* a Memorandum of Law directed toward the third, fourth, and fifth defenses raised by the defendants' answer in the instant antitrust proceeding. In this Memorandum of Law the Commission took the position that in approving the Westinghouse-NBC exchange, it did not in fact determine whether the transaction was violative of the antitrust laws and did not intend to foreclose antitrust proceedings by the United States. In addition, the Commission took the further position that, regardless of its intentions, it could not as a matter of law grant antitrust immunity by its actions in broadcast licensing cases.

DISCUSSION

1. The holding of the district court that Commission approval of an exchange of broadcast licenses bars the United States from subsequently maintaining an antitrust suit involving the same transaction,[1] poses serious practical difficulties for the Commission. The Commission is faced with the equally undesirable alternatives of either deferring action on any broadcast matter with antitrust implications until after the United States has proceeded in the courts or itself becoming a forum for antitrust litigation. Postponing action while the Department of Justice conducts an investigation, evaluates its findings, determines whether or not to proceed, and, if so, processes the case through the district and appellate courts would not only deprive the public of needed broadcast service in many instances but also thwart the statutory directive that the Commission "conduct its proceedings in such manner as will best conduce to the proper dispatch of business" (Section 4 (j) of the Communications Act, 47 U. S. C. 154 (j)) and "promote prompt and efficient disposition of all matters within the jurisdiction of the Commission" (Section 5 (a) of the Communications Act, 47 U. S. C. 155 (a)). On the other hand, to compel antitrust violations to be litigated before the Commission would bog it down in extended trials and frustrate the Commission's performance of its assigned duties.

[1] While the district court acted upon a stipulation of fact, as to which the Commission was neither a party nor consulted, its decision on the controlling law is not limited to the circumstances of the instant case.

Commission licensing proceedings instituted by application of private parties, where the determination of whether or not to hold an evidentiary hearing lies solely within the discretion of the Commission, are not an appropriate forum for the trial of antitrust proceedings by the United States. At the time of a license application the Government may not have in its possession, in a form appropriate for immediate introduction into evidence, full information as to the events which might constitute the antitrust violation. Even if it does, the evaluation of whether this evidence is sufficient to warrant proceedings under the antitrust laws would appear to be the prerogative of the Department of Justice, which has responsibility for enforcement of these laws, and not that of the forum which would be required to pass upon the matter. Moreover, the Commission may well lack full remedial powers or jurisdiction over the entire pattern of conduct on which an antitrust suit is based. Thus, the scope of the antitrust suit here exceeded the issues before the Commission. The issues in the antitrust case are not limited to the NBC-Westinghouse exchange but include also an allegation of a continuing unlawful conspiracy or combination by RCA and NBC; and the relief sought by the United States in the antitrust proceeding goes beyond mere vacation of the transfer approved by the Commission.

2. For the reasons set forth in the Jurisdictional Statement (pp. 8–13), we believe that the decision of the district court is erroneous. In brief, we agree that Section 313 of the Communications Act expressly makes the antitrust laws applicable to broadcasting

and authorizes a district court, in any suit brought to enforce such laws, to revoke the Commission-granted license of an antitrust violator. Nowhere in the Communications Act did Congress confer upon the Commission power to grant antitrust exemptions in broadcasting although it conferred such power with respect to telephone and telegraph common carriers. Sections 221 (a) and 222 (c) (1) of the Communications Act (47 U. S. C. 221 (a) and 222 (c) (1)).

In determining whether the grant of a broadcast license will serve the public interest under Sections 309 and 310 (b) of the Communications Act (47 U. S. C. 309 and 310 (b)), the Commission considers and evaluates the conduct of applicants insofar as it relates to matters entrusted to the Commission: *Report on Uniform Policy as to Violation by Applicants of Laws of the United States, Docket No. 9572 (1950)*, 1 Pike & Fischer Radio Regulation, Part III, 91:495. But the Commission does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the "substance of these practices * * * to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest," (*Id.*, 1 Pike & Fischer, R. R., Part III, 91:497). As the Commission has stated with the approval of this Court: "It is not our function to apply the antitrust laws as such" (*National Broadcasting Company* v. *United States*, 319 U. S. 190, 223–224). See also, *Mansfield Journal Company* v. *Federal Communications Commission*, 180 F. 2d 28, 33–34 (C. A. D. C.).

Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently bringing an antitrust suit challenging those transactions.

Respectfully submitted,

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No. 54

In the Supreme Court of the United States

October Term, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

[illegible]
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 194-199) is reported at 158 F. Supp. 333.

JURISDICTION

This suit was brought under § 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The order of the district court dismissing the action was entered on January 28, 1958 (R. 199), and the notice of appeal was filed in that court on February 21, 1958 (R. 200). This Court noted probable jurisdiction of the appeal on June 16, 1958 (R. 204). The jurisdiction of this Court is conferred by § 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29), as amended by § 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

STATUTES INVOLVED

The pertinent provisions of §§ 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of §§ 221 (a), 222 (c) (1), 310 (b), 311, 313 and 414 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U. S. C. 151 *et seq.*), are as follows:

> SEC. 221. (a) Upon application of one or more telephone companies for authority to con-

solidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

* * * * *

SEC. 222. (c) (1) Whenever any consolidation or merger is proposed under subsection

(b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of the Army, the Attorney General of the United States, the Secretary of the Navy, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. * * *

* * * * *

SEC. 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any

corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this Act for the permit or license in question; * * *

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.

* * * * *

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any

of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

* * * * *

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission in permitting an exchange of broadcasting licenses precludes the United States from subsequently maintaining a Sherman Act suit charging (a) a conspiracy in restraint of trade which was partially effectuated by a broadcasting station acquisition involved in the license exchange permitted by the Commission, and (b) a contract in restraint of trade, namely, the station exchange agreement.

2. Whether the action is barred, under general equitable principles such as laches and estoppel, because the complaint was not filed before the station exchange was consummated.

STATEMENT

The Government brought this civil action under § 4 of the Sherman Act charging the Radio Corporation of America (RCA) and its wholly-owned subsidiary, the National Broadcasting Company (NBC), with violations of § 1 of the Sherman Act (R. 1). After a preliminary hearing on the validity of the defendants' affirmative defenses based on the Federal Communications Commission's permission for one of the acts charged, the district court sustained the defenses and dismissed the action (R. 199). This appeal followed.

1. The facts alleged by the Government[1] to constitute the violation of the Sherman Act were as follows: In February 1954, NBC owned five VHF television stations, the maximum number allowed under the Commission's licensing rules. The "markets" (*i. e.*, metropolitan areas) in which they were located, and the ranking of those markets in terms of both population and retail sales, were (R. 5): New York (1), Chicago (2), Los Angeles (3), Cleveland (10) and Washington (11). In numerous conferences and communications between RCA and NBC it was decided that NBC should dispose of its two stations in the smaller markets, Cleveland (10) and Washington (11), and acquire in their stead two stations within at least the eight largest markets (R. 6). RCA was interested in this acquisition not only indirectly as the parent of NBC but also because of the direct benefits

[1] In the complaint (R. 1–8), as elucidated by the Government's answers to the defendants' interrogatories (R. 33–46) and its motion for production of documents (R. 19–22).

to it, such as the enormous advertising value in the sale of RCA consumer goods of the repetitive mention of its name in connection with the station's identification (R. 20) and the value of the NBC-owned stations in the promotion of color television in the larger markets (R. 20–21). See also R. 45. To accomplish this, it was determined that NBC—which, in addition to its broadcasting stations, owned and operated one of the two major networks—would utilize its power to withhold network affiliation[8] to induce station owners in two of the eight primary markets not already occupied by NBC (*i. e.*, Philadelphia (4), Detroit (5), Boston (6), San Francisco (7), or Pittsburgh (8)) to exchange such stations for NBC's stations in Cleveland and Washington (R. 6, 41).

In furtherance of this conspiracy, NBC approached the Westinghouse Broadcasting Company (Westinghouse) to negotiate an exchange of its station in Cleveland for Westinghouse's in Philadelphia.[9] NBC threatened, unless Westinghouse agreed to the exchange, to discontinue Westinghouse's NBC network affiliations in both Boston and Philadelphia; to refuse affiliation for a station then being acquired by Westinghouse in Pittsburgh; and to refuse affiliation for any further stations Westinghouse might acquire

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[8] The complaint alleged that "Affiliation * * * is generally essential to the economic survival of television stations except in the three largest major markets" (R. 4).

[9] Initially NBC had proposed to exchange its two stations in Cleveland and Washington for Westinghouse's two stations in Philadelphia and Boston, but the negotiations were ultimately limited to the exchange involved here (R. 55).

in the future (R. 6–7). Thereafter NBC and Westinghouse entered a contract providing that, upon obtaining the required Commisison consent to the license exchange, NBC would exchange its Cleveland station, plus $3,000,000, for Westinghouse's Philadelphia station (R. 7, 140). The agreement further required NBC to give Westinghouse an NBC affiliation for the Cleveland station (R. 143–144). Though not incorporated into the formal exchange contract, it was also agreed that NBC would not enter the Boston market with its own station and would continue Westinghouse's NBC affiliation there and that NBC would grant NBC affiliation for Westinghouse's proposed Pittsburgh station (R. 44).

On December 21, 1955, after investigation but without a hearing, the Commission entered an order, without opinion,[4] approving the license exchange (R. 152). The properties were exchanged on January 22, 1956 (R. 140). With only half of the object of the conspiracy thus accomplished, the conspiracy continued at least to the date of the complaint filed in this action (R. 6, 40). In addition, under its agreement with Westinghouse, NBC remained under a continuing duty not to enter the Boston market and to continue Westinghouse's NBC affiliations (R. 44).

On these alleged facts, the Government charged both a conspiracy (between RCA and NBC) and a contract (between NBC and Westinghouse) in unreasonable restraint of trade, in violation of § 1 of the Sherman Act. The relief requested was that the

[4] See note 5, *infra*.

court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia station; revoke the station license; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets (R. 8, 45, 188).

2. In their answer, appellees raised the following affirmative defenses: (1) that the action was barred by the administrative finality of the Commission's action; (2) that, for the same reason, the district court lacked jurisdiction over the subject matter of the suit; and (3) that the doctrines of res judicata and collateral estoppel precluded the Government from maintaining the action (R. 31–32). The Government moved, pursuant to Rule 12 (d) of the Federal Rules of Civil Procedure, for a preliminary hearing and determination before trial of the sufficiency of these three defenses (R. 102). Appellees moved to dismiss the complaint for lack of jurisdiction or, in the alternative, for summary judgment in their favor, based on these affirmative defenses (R. 165–166).

The parties entered into a stipulation "for the purpose of any determination of the merits of" the three defenses (R. 137). The stipulation stated, *inter alia*, that after NBC and Westinghouse had filed their applications with the Commission for approval of the station exchange, the Commission notified the Department of Justice that the applications raised possible antitrust questions; that the Commission conducted an extensive investigation of the proposed exchange and the negotiations leading to it and kept the De-

partment of Justice fully informed as to the evidence which it had in respect thereto; that in considering the proposed exchange, the Commission "had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws," and that the Commission "decided all issues relating to the exchange which it could lawfully decide"; that in granting the applications the Commission "had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action"; and that, although the Department of Justice had the right to request that the exchange applications be set for hearing, to request re-consideration, to protest the Commission's decision, and to obtain judicial review of the decision by appeal under the Act, it did not "exercise any of these rights" (R. 138–140).

3. On January 10, 1958, the district court held that the affirmative defenses were "valid and constitute a bar to the prosecution of this suit" and dismissed the action (R. 199). The court upheld appellees' contention that appeal to the Court of Appeals for the District of Columbia Circuit, under § 402 of the Communications Act, was the "exclusive means by which an order of the Commission may be reviewed by the courts and that, no appeal having been taken, the Court lacks jurisdiction of this suit" (R. 195).

It further ruled that, even if it had jurisdiction, it could not "properly exercise it" (R. 197). The court stated (*ibid.*) that the Commission had before it all the evidence on which the antitrust suit was based; that the Commission was "under a duty to pass upon the issues presented by this evidence"; and that there

was "no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States."[8]

Finally, the court held there was an additional "compelling reason why this suit should not be proceeded with" (R. 198). The court stated (R. 199) that the Commission's approval was not granted until more than four months after the Antitrust Division had been officially notified of the proposed transaction "and alerted for possible antitrust features"; that the transaction was consummated after the time for appeal from the Commission's order had expired and it involved an exchange of millions of dollars worth of property, $3,000,000 in cash, and "extensive changes in personnel, organization and operating procedures"; and that the present suit "presented no new facts and nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming."

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[8] The Commission issued no opinion in approving the exchange. However, in a dissenting statement one Commissioner questioned whether "certain provisions of the Clayton Act (via 15 U. S. C. Section 18) might prevent the Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the antitrust laws were involved in the circumstances of these transactions" (R. 156). In reply, two Commissioners stated (R. 165):

> No restraint of trade, or attempt to monopolize television services in any of the trading areas involved are discernible in this exchange transaction.
>
> It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from ex-

SUMMARY OF ARGUMENT

1. In determining whether to grant a license or to approve a transfer of an existing license, the Commission's only function is to determine whether the "public interest, convenience, and necessity will be served thereby" (§ 310 (b)). In doing so, it is not charged with "the duty of enforcing" the Sherman Act or applying "the antitrust laws as such," although obviously it "should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224. Accordingly, as the Commission stated with respect to this case, while it "considers and evaluates the conduct of applicants insofar as it relates to matters entrusted to the Commission * * * [it] does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the 'substance of these practices * * * to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest'" (Supp. Mem. 7). In short, it considers such conduct only to the extent necessary in formulating a final judgment

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amining into this or any other transaction of the network companies. Specific intent to restrain trade or to monopolize can seldom be spelt out of a single transaction—whether approved by a governmental agency or not. A plan or a scheme generally consists of a pattern of conduct. Such an over-all look is still available to the F. C. C. or any other governmental agency.

whether the license transfer would be in the "public interest"; it makes no independent "findings" or "decisions" as to those issues which could be in any way relevant for any other purpose.

But even if the Commission had made express findings that the conduct was not illegal, they could be of no effect in this action. Clearly collateral estoppel—the only theory under which the "findings" as distinguished from the "order" itself could be relevant—could not apply to a mere conclusion of law made by an administrative agency without a hearing in a proceeding to which the party sought to be bound (the Government) was not a party. Thus the only possible question is whether the order itself, quite apart from the alleged findings on which it was based, operates under the Act to exempt from the antitrust laws the acquisition thereby "authorized".

2. Admittedly the Act provides no express exemption from the antitrust laws for conduct authorized by the Commission in radio licensing proceedings. Since exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U. S. 188), that should conclude the matter. In any event, the Act affirmatively shows that no such exemption was intended.

In the provisions of the Act dealing with telephone and telegraph companies—over which the Commission has much more extensive regulatory powers than it does over broadcasting—Congress expressly provided that consolidations or mergers of such companies approved by the Commission would be exempt

from the antitrust laws (§§ 221 (a), 222 (c) (1)). This detailed specification of the circumstances under which Commission action results in antitrust immunity precludes a finding of an implied exemption in other circumstances.

In addition, the provisions specifically applicable to radio broadcasting affirmatively show that Congress intended to make radio licensees fully subject to the antitrust laws. Section 313 expressly declares that "All laws" relating to monopolies and restraints of trade are "to be applicable to * * * interstate or foreign radio communications," and provides that if, in "any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws," a licensee is found guilty of antitrust violations, the court may "in addition to the penalties imposed by said laws" order the revocation of his license. Section 311, in turn, requires the Commission to refuse a new license to any person whose license has been so revoked. Thus, far from making the Commission's conclusions on such questions binding on the courts, the Act does just the opposite and reaffirms the primary jurisdiction of the courts over such matters, making their determinations conclusive on the Commission. The legislative history, in turn, demonstrates that that was the very purpose of those provisions.

3. The lapse of 11 months between the Commission's order and the filing of the complaint is clearly not an adequate basis for barring this action under general equitable principles. Obviously the Government

could not have completed its investigation, resolved the questions raised, and drafted a complaint before the exchange was consummated (only 32 days after the order), and the time required thereafter to complete the necessary steps was not only reasonable but did not prejudice appellees. The real basis for the district court's view seems to have been its conclusion that the Government should have appealed from the Commission's order, but that action could at most have resulted in setting aside the Commission's order and would have afforded no relief against the continuing conspiracy alleged in the complaint. Nor have appellees shown that they consummated the exchange in the reasonable belief that they would not be proceeded against for the serious antitrust violations alleged here. At all events, tardiness in bringing the suit could not immunize appellees from liability for their violations. For, "even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in insuring compliance with the antitrust laws "are not to be forfeited as a result." *United States* v. *California*, 332 U. S. 19, 39–40.

I

THE COMMISSION DID NOT DECIDE THE ANTITRUST QUESTIONS

In dismissing the complaint the district court ruled that "in finding that the exchange was in the public interest, it [the Commission] necessarily decided

(whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States" (R. 197). Since that decision was not challenged by a direct appeal from the Commission's order (R. 195–196), the court held, apparently on the basis of principles "akin to res judicata" (R. 195), that Commission approval of the license exchange barred a subsequent antitrust suit challenging conduct which included the exchange.

1. The decision below rests upon a basic misconception of the Commission's functions. In granting, renewing, or authorizing transfers of broadcasting licenses, the Commission's sole function is, in the language of the section specifically applicable to transfers, to determine whether "the public interest, convenience, and necessity will be served thereby" (§ 310 (b)).[8] Obviously, "competition is a relevant factor in weighing the public interest." *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 94; see also *Mansfield Journal Co.*

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[8] In approving a license "exchange" the Commission's function is, of course, no different from the function it performs in granting or renewing station licenses generally. See § 310 (b). In contrast to its extensive regulatory powers over telephone or telegraph companies (see §§ 201–222), the Commission has no direct control or power over the financial or other business activities of radio licensees as such. Its only powers are to grant or withhold broadcasting licenses, without which, of course, the applicant's future broadcasting will be illegal. Thus the substance of its action in this case was simply to grant NBC authority to broadcast television programs in Philadelphia for the period of the license, while simultaneously authorizing Westinghouse's broadcasting in Cleveland.

v. *Federal Communications Comm'n*, 180 F. 2d 28, 33–34 (C. A. D. C.). The Commission is not, however, charged with "the duty of enforcing" the Sherman Act or "apply[ing] the antitrust laws as such," although it should, of course, "administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224.

Thus, while the Commission quite properly takes into account the policies of the antitrust laws in administering its licensing powers, it has neither the authority nor the duty to conduct "trials" to "adjudicate" the legality of an applicant's conduct under the antitrust laws—or, for that matter, any other laws. Evidence indicating that there may have been violations of such laws is relevant insofar as it bears on the ultimate question of whether the requested license will be in the public interest; but it is relevant for no other purpose and can have no other effect. Likewise the Commission's views, if any, as to the legality of an applicant's conduct are no more than tentative judgments reached by the Commission in weighing the effect of such conduct on the applicant's qualifications to operate the station in the public interest. They are in no way intended to be a final or conclusive determination of such issues or to bind other agencies directly concerned with the enforcement of such laws.

In this case, since the Commission neither held a hearing nor announced an opinion, it is impossible to tell from the record what the Commission con-

cluded with respect to the antitrust violations alleged here. The district court apparently relied on the stipulation, entered into for purposes of the preliminary ruling on the affirmative defenses, that "In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws" and that the Commission "decided all issues relating to the exchange which it could lawfully decide" (R. 139). But, as the Commission itself recognized, it had no power to "decide", in any meaningful sense, questions as to the legality of an applicant's prior conduct. As the Commission stated in its memorandum filed in support of the Jurisdictional Statement, while it "considers and evaluates the conduct of the applicants insofar as it relates to matters entrusted to the Commission * * * [it] does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the 'substance of these practices * * * to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest'" (Supp. Mem. 7). It is clear, therefore, that the Commission in fact did not decide that NBC had not violated the antitrust laws. At most, it held only that the evidence before it, unshaped by any formal charge of antitrust violation or even public hearing, did not constitute a sufficient basis for concluding that the license exchange would not be in the public interest. Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n*, 343 U. S. 414, 422.

2. But even if the Commission had made express findings, that there had been no violation of the antitrust laws in the events leading to the exchange or in the exchange itself, it is difficult to see how such a finding could in any way be conclusive in a subsequent antitrust proceeding. It may be conceded that the Commission's order was reviewable only by the court of appeals on direct review under § 402 (b) of the Act, but that establishes only that the order was *final* and is of no help in determining what the *effect* of the order was. On its face, its only effect was to grant NBC a license to broadcast in Philadelphia. But since the Act expressly provides that licenses granted by the Commission may be revoked in antitrust proceedings (§ 313, discussed *infra*, pp. 27-34), that is of no help to appellees here, and they must rely instead upon some collateral effect of the order.

What the district court seems to suggest, and appellees to argue, is that, although the order did not in itself exempt appellees from antitrust proceedings, the alleged subsidiary "finding" that there was no antitrust violation operates by way of principles "akin to res judicata" (R. 195) to control the disposition of that issue in any subsequent proceedings. The analogy, presumably to the doctrine of collateral estoppel, is unsupportable; and one may doubt whether appellees would accept the conclusion, implicit in their argument, that a denial by the Commission of an application on the ground that the arrangements were in violation of the antitrust laws would, in subsequent Sherman Act proceedings, constitute a bind-

ing determination of the illegality of such arrangements. The Commission is an administrative agency, not a court, and its "findings" have only such effect as Congress chooses to give them. Quite apart from that, however, the alleged finding here in no way meets the requirements of collateral estoppel: the finding, if any, was one of law and not of fact; there was no adversary proceeding, no hearing, and no "litigation" of the issue; and neither the Government nor RCA was a "party" to the proceeding.

Clearly, therefore, notwithstanding the appellees' charge that the distinction is "semantic" (Motion to Affirm, p. 5), the only theory upon which the Commission's order could preclude the instant action is by finding in the Communications Act an intent to exempt from the antitrust laws transactions "authorized" by the Commission.

II

THE ACT DOES NOT EXEMPT FROM THE ANTITRUST LAWS TRANSACTIONS APPROVED BY THE COMMISSION IN RADIO LICENSING PROCEEDINGS

There is, of course, no express provision in the Communications Act creating an exemption from the antitrust laws for conduct authorized by the Commission in radio licensing proceedings.[1] In view of

[1] For that reason, we fail to see the relevance of *Far East Conference* v. *United States*, 342 U. S. 570, relied on by the district court. Under the terms of the Shipping Act there involved, the Federal Maritime Commission was expressly given the power to approve conference rate agreements complying with the terms of the Shipping Act and thereby exempt them from the antitrust laws. The question was whether the Gov-

the settled principle that exemptions from the Sherman Act are not to be implied (*United States* v. *Borden Co.*, 308 U. S. 188; *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196), that should be conclusive that the Commission's action has no such effect. That no such exemption was intended, moreover, is shown by the face of the Act itself, which both (1) expressly confers antitrust exemptions in other circumstances and (2) affirmatively indicates that radio licensees are to remain fully subject to the antitrust laws.

A. CONGRESS HAS EXPRESSLY DEFINED THE EXTENT TO WHICH COMMISSION ACTION RESULTS IN ANTITRUST IMMUNITY

Under the Communications Act, the Commission has regulatory powers not only over radio broadcasting (which includes television) but also over telephone and telegraph companies. The sections of the Act dealing with the latter contain several provisions expressly conferring antitrust exemptions. Section 222 (e) (1) provides that if the Commission, after hearing and upon notice to the Attorney General and other interested public officials, approves a consolidation or

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ernment could maintain a civil antitrust action to enjoin a rate agreement which had not been passed upon by the Board. The Court held that the Board should first be given an opportunity to exercise its power to determine whether the agreement complied with the Shipping Act requirements and, if so, to exempt it from the antitrust laws. The very premise of that decision, however, was the admitted power of the Board to exempt agreements complying with the Shipping Act from the antitrust laws. Here, on the other hand, it is the *existence* of such a power that is the very question, and it is difficult to see how the *Far East* case has any bearing on that question.

merger of telegraph companies, "thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger." A similar immunity is provided in § 221 (a) for consolidations or acquisitions of telephone companies approved by the Commission.

The Act provides no similar exemption for transactions approved by the Commission in radio licensing proceedings. The inference is inescapable that none was intended. Indeed, if, as appellees argue, the fact of Commission approval without more was enough to create immunity, the express provisions of §§ 222 and 221 would have been unnecessary. It is also significant that § 222 (c) (1) expressly requires notice to the Attorney General and a hearing before the Commission's approval, and consequent antitrust exemption, is given, and § 221 (a) contains comparable safeguards. Had Congress intended radio licensing orders to have the same effect, it would presumably have imposed similar procedural safeguards in such proceedings. Section 310 (b), however, under which the Commission acted in approving the license exchange, neither requires a hearing, provides for formal notice to the Attorney General, nor contains any other provision that would seem to be appropriate, in a proceeding designed to create an antitrust exemption, to assure full representation of the public interest.*

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*It may be noted also that the form of the Commission's action in granting licenses or approving transfers seems quite inappropriate for an order designed to exempt the underlying transaction from the antitrust laws. The Commission does not in terms "approve" the underlying acquisition of the properties;

In other areas also Congress has expressly provided the extent to which agency action should result in immunity from the antitrust laws. For example, specific grants of antitrust immunity are provided in the Shipping Act of 1916 (§ 15, 46 U. S. C. 814), the Interstate Commerce Act (§§ 5 (11), 5a (9), 49 U. S. C. 5 (11), 5b (9)), the Civil Aeronautics Act of 1938 (§ 414, 49 U. S. C. 494), the Agricultural Adjustment Act (§ 8b, 7 U. S. C. 608b), the Agricultural Marketing Agreement Act (§ 3 (d), 7 U. S. C. 671 (d)), and the Securities Exchange Act of 1934 (§ 15a, 15 U. S. C. 78*o*-3 (n)). All of these provisions specify in detail the conditions under which the exemption may be provided, carefully delimit its scope, and contain procedural safeguards—such as notice of the proceedings which may result in the exemption, appropriate findings, etc.—designed to assure full consideration of the issue before exemption is conferred.

Thus where Congress has determined that activities by persons subject to the jurisdiction of a regulatory agency should be exempt from the antitrust laws as a result of agency action, it has specifically provided such an exemption in explicit terms which carefully prescribe the conditions under which exemption may be granted. In the absence of such a provision,

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its order, in its formal aspects at least, simply grants to the applicant authority to broadcast for the period of the license. In addition, it is significant that the Commission does not have the extensive regulatory powers over persons engaged in broadcasting that are usually associated with—and which the Commission has, for example, over telegraph and telephone companies—the power to confer antitrust exemptions.

therefore, there can be no basis for inferring an exemption simply because an agency with regulatory powers over the industry has permitted part of a course of action later challenged under the antitrust laws.

That exemptions of agency-regulated industries from the antitrust laws are to be limited to the precise scope of the exemption granted by Congress would seem to be established by this Court's decision in *United States* v. *Borden Co.*, 308 U. S. 188. There the Court upheld a Sherman Act indictment charging a price-fixing conspiracy in the transportation and distribution of milk against an argument that the Agricultural Marketing Agreement Act of 1937, by making such agreements subject to the control of the Secretary of Agriculture, exempted them from the antitrust laws. Although the argument there was distinguishable in that the agreement had not been expressly approved by the Secretary, the basis for the Court's decision is equally applicable here. Referring to two provisions of the Act which specifically exempted certain agreements approved by the Secretary from the antitrust laws, the Court pointed out that "the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable" and concluded that (*id.* at 200–201):

> These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

So also the specific exemptions in §§ 221 and 222 of the Communications Act "show beyond question how far Congress intended that" that Act "should operate to render the Sherman Act inapplicable," and that, if Congress had intended Commission approval of radio license exchanges to confer antitrust immunity, it "would have said so". The principle applied in the *Borden* case—that exemptions from the Sherman Act are not to be implied—has been frequently reasserted in rejecting attempts to read into other acts similar antitrust exemptions for industries subject to agency regulation. *United States Alkali Export Ass'n* v. *United States,* 325 U. S. 196, 206, 209–210; *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457; *Pennsylvania W. & P. Co.* v. *Consolidated G., E. L. & P. Co.,* 184 F. 2d 552, 560 (C. A. 4), certiorari denied, 340 U. S. 906; *Consolidated G., E. L. & P. Co.* v. *Pennsylvania W. & P. Co.,* 194 F. 2d 89, 94–100 (C. A. 4), certiorari denied, 343 U. S. 963; cf. *United States* v. *McKesson & Robbins,* 351 U. S. 305, 316.

B. THE COMMUNICATIONS ACT AFFIRMATIVELY INDICATES THAT RADIO LICENSEES ARE TO BE FULLY SUBJECT TO THE ANTITRUST LAWS NOTWITHSTANDING COMMISSION ACTION

Not only does the Communications Act not expressly grant antitrust exemptions to radio licensees on the basis of Commission action, but to the contrary it contains numerous provisions affirmatively indicating that no such exemption was intended. These provisions show that, while "competition is a relevant factor in weighing the public interest" and thus may properly be considered by the Commission

in exercising its powers (*Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 94), it is the courts, and not the Commission, which have the final power to pass on Sherman Act violations.

1. Section 313 of the Act provides:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to * * * interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws * * * any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall * * * be revoked * * *.

This provision would seem completely dispositive of the present contentions, especially when its language is compared to that of the exemption provisions of §§ 222 and 221, *supra*. Not only does § 313 provide, in the broadest possible language, that all antitrust laws shall be applicable to broadcasting,[9] but it clearly contemplates that those laws may be enforced by means of independent antitrust proceedings and expressly authorizes a Commission license to be revoked by the court in any such proceeding. In turn, § 311

[9] Section 313 applies to both radio and television broadcasting. *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C. A. 3), certiorari denied, 340 U. S. 929.

requires the Commission to refuse a new license to a person whose license has been thus revoked. Thus, far from making Commission action conclusive in antitrust proceedings, §§ 311 and 313 do just the opposite: they make the anti-trust proceedings conclusive on the Commission.

In short, it is the Commission which must follow the courts' resolution of antitrust issues, not the courts which must follow the Commission. It is difficult to see what more express language Congress might have used to achieve that result, and the decision below seems explicable only by reason of the court's failure to mention this provision. In short, by § 313, "Congress considered and expressly saved civil anti-trust suits in this field," and there can be no doubt "that civil actions for anti-trust violations by radio or television stations are cognizable and entitled to decision on their merits in the federal courts." *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 255 F. 2d 708, 709 (C. A. 3).[10]

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[10] See also § 414 of the Act, which provides that:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

A substantially identical provision of the Civil Aeronautics Act (§ 1106, 49 U. S. C. 676) was held to have been "obviously designed to give survivorship to the remedies embodied in the anti-trust laws" and to preclude any argument that that act vested "primary jurisdiction" in the Board so as to bar a private treble damage action. *Slick Airways* v. *American Airlines*, 107 F. Supp. 199, 217 (D. N. J.), appeal dismissed, 204 F. 2d 230 (C. A. 3), certiorari denied, 346 U. S. 806.

See also § 314 of the Communications Act, which further shows a purpose to make radio licensees subject to antitrust

2. That this was the intended purpose of § 313 is indicated also by the legislative history of that provision. The section was originally enacted as § 15 of the Radio Act of 1927, 44 Stat. 1168. During the Senate debate on that measure, Senator Dill, who was in charge of the bill, was asked whether "there [is] anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman antitrust law or controls a monopoly that the commission may pass upon the question?" Senator Dill replied that, although the bill provided for denial of a license to anybody who "has been convicted under the Sherman antitrust law or any other law relating to monopoly," it "does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court." 67 Cong. Rec. 12507.[11]

The meaning and scope of § 313 are even more clearly illumined by the legislative history of the 1952 amendments to § 311. As originally enacted, § 311 had provided:

> SEC. 311. The Commission is hereby directed to refuse a station license * * * to any person * * * whose license has been revoked by

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prohibitions by expressly prohibiting such licensees from acquiring any wire or cable telephone or telegraph line or system where the effect "may be to substantially lessen competition or to restrain commerce * * * or unlawfully to create monopoly in any line of commerce * * *."

[11] The legislative history of the Communications Act of 1934 throws no light on this problem. It shows only that Congress considered Section 313 as "substantially identical" with Section 15 of the Radio Act of 1927. H. R. Rep. No. 1918, 73d Cong., 2d Sess., p. 47.

> a court under section 313, *and is hereby authorized to refuse such station license* * * * *to any other person* * * * [*who*] *has been finally adjudged guilty by a Federal court of* [*antitrust violations*] * * *. *The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for* [*antitrust violations*] * * *. [48 Stat. 1086; italics added.]

The 1952 amendments to the Act deleted the last half of the first sentence plus the entire second sentence (*i. e.*, the portion of the section italicized above). So conclusive on the present question were the reasons given for this deletion by the Senate Committee that we have set forth in a footnote the full text of its report on this amendment.[11] The report is

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[11] Sen. Rep. No. 142, 82d Cong., 1st Sess. 9:

Section 10

This section amends section 311 of the present act which relates to the application of the antitrust laws of the United States. The existing law contains two sections (secs. 311 and 313) which deal with this subject. Section 313 of the present law makes clear that all licensees under the Communications Act come within the provisions of the antitrust laws and that if any licensee is found guilty of a violation of antitrust laws the court may, as an additional penalty, also revoke the license of the person or group found guilty. Section 311 of the present law specifically directs the Commission to revoke any license which the court has ordered to be revoked under the authority of section 313 and authorizes the Commission to revoke the license of a person found guilty of antitrust violation if the court itself has not ordered such revocation.

Licensees have consistently contended during various hearings before this committee that these two sections considered together as now written constitute an unfair discrimination against radio licensees and that such a double

concerned primarily with the reasons for eliminating the last half of the *first* sentence (which had authorized the Commission to revoke a license when a court had found the licensee guilty of antitrust violations even though the court had not itself ordered such revocation under § 313). The committee thought that

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penalty is not imposed upon other classes of business by any other statute.

The committee is impressed with the legal validity of the protests which have been made against this type of double jeopardy. It believes there is merit in the contention that citizens should not be subject to trial for the same allegations before two different tribunals. Moreover, such an argument is particularly pertinent in connection with alleged violations of the antitrust statutes which are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government.

The committee has made no change in section 313. That section, which makes all licensees amenable to the antitrust statutes and specifically grants the court authority, if a licensee is found guilty of an antitrust violation, to order revocation of his license in addition to all other penalties which may be imposed under authority of the antitrust laws, stands unchanged and unimpaired. It has, however, modified section 311, which gave to the Federal Communications Commission additional authority to institute license revocation proceedings in those cases where a licensee has been found guilty in court of an antitrust violation but where the court did not order revocation of the license issued by the Commission. The modification proposed merely prohibits the Commission from instituting its own antitrust proceeding. It retains the specific authority to refuse a license or permit in those cases in which a court under section 313 has ordered revocation of the license or permit.

The committee desires to emphasize that the Commission's existing authority under law to examine into the character of a licensee or permittee in granting a license or a renewal is in no way impaired or modified by the

that provision, by permitting the Commission to retry the antitrust case and impose an additional penalty not ordered by the court, created a "type of double jeopardy" and that licensees should not thus be made "subject to trial for the same allegations before two different tribunals." It added, reaffirming the primary jurisdiction of the courts over antitrust violations, that: "Moreover, such an argument is particularly pertinent in connection with alleged violations of the antitrust statutes which are the particular province of the Department of Justice and do not, by any other law, come within the jurisdiction of any independent quasi-judicial agency of government." Noting that § 313, "which makes all licensees amenable to the antitrust statutes," remained "unchanged and unimpaired", the committee concluded that "The modification proposed merely prohibits the Commission from instituting its own antitrust proceeding." It is difficult to see how these statements could be used, as the district court used them (R. 196–197), to establish the very opposite proposition—

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change here recommended in section 311. The Commission's authority to determine whether or not the public interest, convenience, or necessity will be served by the granting of a license remains paramount and if it finds that the conviction of a licensee under the antitrust laws or under section 313 has materially affected the character or standing of such licensee so as to warrant refusal of a renewal, or grant of license, it may so proceed. Thus, the Commission's power to protect against monopoly control of radio licenses remains unaffected by the changes herein recommended; it is merely estopped from initiating and proceeding with an antitrust case of its own.

that Congress intended to foreclose judicial proceedings in favor of Commission action.

The Senate committee report did not expressly advert to the reason for the deletion of the *second* sentence of § 311 (which had expressly provided that the granting of a license would not preclude antitrust proceedings). That explanation, however, was supplied by the conference report, which stated that that deletion was not

> * * * of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way. [H. R. Rep. No. 2426, 82d Cong., 2d Sess. 19.]

In sum, to our view this legislative history clearly establishes that Commission licensing actions were not intended to bar the United States from commencing independent proceedings charging violations of the antitrust laws and naming, among other defendants, Commission licensees. Even absent such an affirmative showing in the legislative history, however, the result would be the same. For "there is nothing in [the Act's] legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws * * * [and] the absence of more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal any por-

tion of § 4 of the Sherman Act." *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 210–211."

" Finally, while we think it unnecessary to reach the question, it should be pointed out that, even if an exemption from the antitrust laws for action "authorized" by the Commission could be implied, it would not necessarily preclude the action here. The most that the Commission could be said to have affirmatively "authorized" by its order was the final exchange itself, and that is only one aspect of the alleged antitrust violations. Since they were commenced prior to the Commission's action, its order could not possibly have "authorized" the conspiracy between RCA and NBC; the coercive use of NBC's control over network affiliations to induce Westinghouse to agree to the exchange; or the collateral terms of the exchange agreement requiring NBC not to acquire a station in Boston and to give Westinghouse NBC affiliations there and elsewhere. Similarly, it is apparent that the order in no way "authorized" the continuing conspiracy charged in the complaint. It would seem that even an express exemption from the antitrust laws of a station acquisition effected pursuant to the Commission's grant of a license would protect the licensee only from antitrust charges based solely on the acquisition itself—*e. g.*, a claim that the acquisition tended to lessen competition and was forbidden by § 7 of the Clayton Act (15 U. S. C. 18)—and would not immunize an unlawful conspiracy or course of conduct of which the acquisition was only a part. Compare, for example, *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, where it was held that the power of the Interstate Commerce Commission to approve filed rates and thereby make them "lawful" (essentially equivalent to exempting such rates from the antitrust laws) did not preclude an antitrust proceeding to enjoin a conspiracy among the railroads to file discriminatory rates. That is, the exemption of the rates themselves did not exempt the surrounding conduct, even though the purpose of it could be achieved only upon Commission approval.

III

THE ACTION IS TIMELY AND IS NOT BARRED BY LACHES OR GENERAL EQUITABLE PRINCIPLES

As an independent ground for dismissing the action, the district court held that the Government should be barred from bringing this action because it did not file its complaint for a period of 11 months following the Commission's order. Noting that the exchange had not been consummated until the time for an appeal from the Commission's order had expired (30 days), and that the consummation involved millions of dollars worth of property and extensive operating changes, the court concluded that this action involved "nothing which the Government had not known for over a year, and no satisfactory explanation for the delay is forthcoming" (R. 199).

1. Clearly, however, a year is not an unreasonable length of time in which to complete an investigation of an antitrust case (even if in fact no new evidence was discovered), analyze the evidence, study and resolve the inevitably numerous legal questions, and draft the complaint. Moreover, the only prejudice found by the district court arose from the failure to file the complaint before the exchange was consummated (32 days after the Commission's order) and not from the subsequent passage of time. The Government can hardly be criticized for not being prepared to initiate the action within that brief span of time.

It is apparent that the real basis for the district court's conclusion was not that the Government could

reasonably have been expected to file an antitrust suit before the transaction was consummated but rather the court's premise, previously expressed (R. 198), that the Government should have appealed from the order of the Commission rather than initiate an independent action. Clearly, however, the Government was not required so to proceed, and not only would the issues on such an appeal not be the same as those in an antitrust proceeding (cf. *McLean Trucking Co. v. United States*, 321 U. S. 67), but an appeal would not have afforded an adequate remedy. While the Government might have been successful in obtaining the reversal of the Commission's order, it could have gotten no relief against the alleged continuing conspiracy.

Even more basically, however, § 313's legislative history affords no support for the district court's apparent view that the United States is obliged to try its antitrust cases before the Commission. The plain effect of the decision below would be to require antitrust cases to be tried before the Commission, rather than a court, if any part of the conduct involved required a license from the Commission for its consummation. The legislative design revealed in § 313, however, clearly envisages enforcement of the antitrust laws by proceedings in courts, not by proceedings before administrative agencies with limited licensing functions.

Finally, appellees, upon whom the burden lies, have not shown that they reasonably relied either upon the Commission's action or the Government's inaction to conclude that the transaction could or would not be

challenged by the Government. As we have shown, they clearly had no reasonable basis for belief that the Commission's action created an immunity from antitrust suits. To the contrary, they were expressly put on notice of the possibility of such action by the statements filed by two of the Commissioners specifically noting that the Commission's approval could not foreclose investigation of the matter by other agencies (R. 165). Similarly, as to the Government's inaction, appellees have not shown that they believed in good faith that the Government had decided not to challenge the transaction or were otherwise not aware that they were proceeding with the exchange at their own risk.[14]

2. But even if there were tardiness in bringing the action, that could not operate to immunize appellees from suit for their violations. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, this Court rejected the contention that responsibility for antitrust violations could be avoided by showing that the challenged acts were done in reliance upon prior approval by Government officials. In upholding a conviction under § 1 of the Sherman Act for fixing gaso-

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[14] Indeed, 10 days prior to the consummation of the exchange, NBC, in a pleading filed with the Commission in a related matter, took the position that

> Congress has made it clear in its enactment of the 1952 amendment to the Communications Act that it did not believe this Commission was the proper forum for the prosecution and adjudication of antitrust litigation (Senate Report 142, 82nd Congress). [NBC's Motion to Dismiss, In re Application of WBUF-TV, Inc., FCC Docket No. 11528, p. 7.]

line prices, the Court ruled (pp. 225–227) that the trial court had not erred in charging the jury that "knowledge or acquiescence of officers of the government [members of the Petroleum Administration Board] * * * would not give immunity from prosecution under that Act" (p. 211). Cf. *Board of Governors of Federal Reserve* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9), where the court sustained the Board's authority to conduct an administrative proceeding under § 7 of the Clayton Act seeking, *inter alia*, to enjoin a bank from acquiring other banks whose acquisition had been authorized by the Comptroller of the Currency.

This Court has pointed out that a "trial court upon a finding of a conspiracy in restraint of trade * * * has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88; see, also, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188. If the Government can prove its charges against appellees, we believe that the trial court would have a clear "duty" to grant appropriate relief, irrespective of the time which elapsed between the Commission's action and the filing of the complaint, and of the fact that a substantial sum of money and "extensive changes in personnel, organization and operating procedures" had taken place. Cf. *United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586, where a district court was directed to grant equitable relief against an antitrust

violation involving a transaction consummated thirty-five years earlier, and one whose undoing presents numerous complex business and legal problems.

The district court relied (R. 198), as do appellees (Motion to Affirm, p. 10), upon *Hecht Co.* v. *Bowles*, 321 U. S. 321, to support its view that it could deny the Government relief in the antitrust case because of laches and estoppel. That case is inapposite. There this Court held that, under the provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. (1940 ed., Supp. II) 901, 925) for injunctive relief against violations of the Act, the issuance of an injunction was not mandatory upon a showing of violation, but lay within the sound discretion of the district court. But the district court there denied an injunction not because of any alleged laches or estoppel, but because it found that the violations were unintentional, that they had been promptly eliminated upon discovery, and that steps had been taken to prevent their recurrence.[15]

In the instant case, however, the violations were willful, not negligent, and have not been terminated, but have continued to the filing of the complaint. In these circumstances, we submit that it would be an abuse of discretion for the district court, if the viola-

[15] The district court found (321 U. S. at 325–326) that the mistakes brought to light "were all made in good faith and without intent to violate the regulations," that upon discovery the violations "were at once corrected, and vigorous steps were taken * * * to prevent recurrence of these mistakes or further mistakes in the future," and that the company sought to make repayment of all overcharges discovered.

tions charged are proven, to deny any relief because of laches or estoppel. "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Hecht Co.* v. *Bowles, supra, at* 331. "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in insuring compliance with the antitrust laws "are not to be forfeited as a result." *United States* v. *California,* 332 U. S. 19, 39–40. For principles such as "acquiescence, laches, or failure to act," which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. *Ibid.*

CONCLUSION

The order of the district court dismissing the action should be reversed.

Respectfully submitted.

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OCTOBER 1958.

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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted].54

UNITED STATES OF AMERICA,
Appellant,

v.

RADIO CORPORATION OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania.

MOTION TO AFFIRM.

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STATUTES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 943.

UNITED STATES OF AMERICA,

Appellant,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO AFFIRM.

Radio Corporation of America and National Broadcasting Company, Inc., pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the district court be affirmed.

STATEMENT.

This case presents a very simple factual situation and a narrow and clear legal issue. The district court's decision dismissing the Government's antitrust suit was rendered on the basis of a stipulation of facts agreed to by all parties. (A copy of the stipulation is attached to this motion as Appendix A, p. 13 *infra*).

National Broadcasting Company, Inc. (hereafter called NBC) and Westinghouse Broadcasting Company (hereafter called WBC) entered into an agreement which provided

that, subject to the approval of the Federal Communications Commission (hereafter called FCC), NBC would acquire WBC's television and radio facilities in Philadelphia (WPTZ and KYW, now WRCV-TV and WRCV) in exchange for NBC's television and radio facilities in Cleveland plus $3,000,000 in cash. The agreement was dated May 16, 1955 (Stip. ¶ 1 at p. 13 *infra.*)

Under the Communications Act of 1934 (47 U. S. C. §§ 151 *et seq.*), the exchange could not take place unless the FCC found it would serve the public interest. 47 U. S. C. § 310(b). Both WBC and NBC filed applications for FCC approval on June 15, 1955. As required by Section 308(b) of the Act, these applications set forth detailed information concerning the qualifications of WBC and NBC, the nature and terms of the proposed transaction, and each applicant's reasons for requesting approval (Stip. ¶ 2 at p. 13 *infra*).

The FCC conducted an extensive investigation of the proposed station exchange, including the negotiations leading to it. Among other things, the FCC interviewed the WBC and NBC officials involved, as well as all other persons who might have relevant information, and examined in detail all documentary material relating to the transaction. Complete reports of this investigation were prepared and considered by the Commission (Stip. ¶¶ 3, 7 at p. 14 *infra*).

On August 12, 1955, the FCC notified the Antitrust Division of the Department of Justice that the exchange applications were pending and that they raised possible antitrust questions (Stip. ¶ 4 at p. 14 *infra*). Thereafter, the FCC kept the Justice Department fully informed of the facts in its possession relating to the exchange and of the status of the WBC-NBC application (Stip. ¶ 11 at p. 15 *infra*).

In October of 1955, the FCC formally reviewed the exchange applications. Three of the seven Commissioners

favored an immediate grant of these applications, but the majority felt that the FCC required further information before taking final action. The Commission's Secretary was therefore directed to issue letters to WBC and NBC pursuant to Section 309(b) of the Communications Act. These letters stated the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the FCC requested further information (Stip. ¶ 5 at p. 14 *infra*).

WBC and NBC answered these inquiries separately, furnishing detailed data. These replies were filed under cover of a joint letter of transmittal, dated November 10, 1955, in which both WBC and NBC urged the Commission to approve the trade as being in the best interests of both companies and consistent with the public interest (Stip. ¶ 6 at p. 14 *infra*).

The record before the FCC was complete. It included, among other things, all of the evidence relating to all of the antitrust issues presented by the complaint in this action (Stip. ¶ 7 at p. 14 *infra*).

On December 21, 1955, the FCC approved the exchange as being in the public interest (Stip. ¶ 10 at p. 15 *infra*). In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws (Stip. ¶ 8 at p. 15 *infra*). Its approval was a valid exercise of its jurisdiction and was in accordance with the Communications Act and the FCC's own rules, regulations and policies (Stip. ¶ 10 at p. 15 *infra*).

The Justice Department had the right to participate formally in the proceeding before the FCC and to oppose the FCC's approval of the exchange on the same grounds upon which plaintiff now asks the court to annul that approval. Plaintiff admits it had this right but did not exercise it. Nor did it exercise any of the administrative or judicial remedies admittedly available to it for obtaining

reconsideration or judicial review of the FCC's decision (Stip. ¶ 12 at p. 15 *infra*). Nor did anyone else oppose the application for approval of the transaction.

Acting in reliance on the FCC's approval, WBC and NBC effected the exchange on January 22, 1956 (Stip. ¶ 13 at p. 16 *infra*).

Almost a year later, *i.e.*, on December 4, 1956, the United States, acting through the Antitrust Division of the Department of Justice, filed a civil suit under Section 4 of the Sherman Act against NBC and its parent, Radio Corporation of America (hereafter called RCA). (A copy of the complaint is attached hereto as Appendix B, p. 17 *infra*.) The complaint alleged that the station exchange transaction was part of a "conspiracy" between NBC and RCA and that the station exchange agreement, of itself, was a contract in unreasonable restraint of trade in violation of Section 1 of the Sherman Act (¶¶ 18, 19, 21 at pp. 22-23 *infra*).

The specific relief requested was that the court declare the alleged "conspiracy" and the station exchange contract to be in violation of Section 1 of the Sherman Act and "order such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate" (¶¶ 1, 2 at p. 24 *infra*).

In dismissing the complaint, the district court (Kirkpatrick, *Ch. J.*) held that:

(1) It had no jurisdiction to set aside or override the action of the FCC;

(2) The FCC's determination (concededly within the scope of its statutory duty) that the exchange transaction was in the public interest was a complete refutation of and defense against any charge that the exchange constituted an unreasonable restraint of trade; and

(3) Controlling principles of equity required denial of equitable relief to plaintiff.

ARGUMENT.

I.

In its jurisdictional statement, appellant attempts to meet grounds (1) and (2) of the district court's decision by essentially semantic arguments. Plaintiff contends that the decision permits the FCC to grant "exemption" or "immunity" from the antitrust laws and that it strips the Attorney General and the district courts of their function to "enforce" those laws. Chief Judge Kirkpatrick's rejection of these arguments was manifestly sound.

The court below recognized the fundamental fact that, as the Government had expressly stipulated, "In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws." (Stip. ¶ 8 at p. 15 *infra*). By Section 313 of the Communications Act, which expressly makes the antitrust laws applicable to broadcasting, the FCC is precluded from finding that any transaction which constitutes an unreasonable restraint of trade is in the public interest. Therefore, a finding that a transaction is in the public interest necessarily implies the subsidiary finding that such a transaction is not an unreasonable restraint of trade.

If a transaction did constitute an unreasonable restraint of trade, a conclusion by the FCC that it was in the public interest would be erroneous as a matter of law. An order posited on such finding could and would be set aside by the Court of Appeals for the District of Columbia in a statutory appeal under Section 402(b) of the Communications Act. But no other court has the power to restrain or annul action taken pursuant to FCC authorization.[1] Venner

v. Michigan Central R.R., 271 U. S. 127, 130-131 (1925); **Lambert Run Coal Co. v. Baltimore and Ohio R.R.**, 258 U. S. 377, 381-382 (1922). The Court of Appeals for the District of Columbia is the only avenue for setting aside an FCC authorization. **Black River Valley Broadcasts, Inc. v. McNinch**, 101 F. 2d 235, 237-238 (D. C. Cir. 1938), *cert. denied*, 307 U. S. 623 (1939); **Monocacy Broadcasting Co. v. Prall**, 90 F. 2d 421, 424 (D. C. Cir. 1937).

Approaching the problem from either the "jurisdictional" or the "substantive" point of view, the Government's antitrust action must fail. **A federal district court is without jurisdiction to annul or set aside the FCC's order or action taken pursuant thereto, and the Commission's determination that the transaction is in the public interest is a complete defense on the merits to a charge that the identical transaction constitutes an unreasonable restraint of trade.** The holding of the court below, therefore, is logically and legally unassailable.

The apparent disclaimer by FCC counsel of the Commission's obligation to deny approval of any transaction which itself would constitute a violation of the antitrust laws (Supp. Mem.[2]) cannot, of course, alter the congressional mandate imposing this obligation on the Commission.

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1. The power of a district court under section 313 to order revocation of a broadcast license as an additional penalty for a broadcaster's violation of the antitrust laws is in no way inconsistent with this general rule. In revoking a license prospectively, the district court neither passes on nor is concerned with the propriety of the Commission's issuance thereof; the district court merely determines that revocation of the license is an appropriate sanction for an antitrust violation, by the licensee, bearing no direct relationship to the transaction approved by the Commission.

2. Examination of the Rules of this Court fails to disclose any provision authorizing the filing of a brief or statement of position by the FCC, which is not a party to this litigation, in connection with a jurisdictional statement.

The FCC's plaintive plea against "itself becoming a forum for antitrust litigation" (Supp. Mem. 5) is hardly compelling when, as in this case, its position amounts to an abdication in favor of the district courts of a major portion of the Commission's exclusive licensing function. The professed fear of FCC counsel that the decision in this case "would bog it down in extended trials and frustrate the Commission's performance of its assigned duties" (Supp. Mem. 5) obscures the limited nature of the district court's holding. The district court did not hold that the FCC is required, or even authorized, to adjudicate whether an applicant has been guilty of any antitrust violations. The court held simply that the Commission may not license or approve a particular transaction which itself constitutes an antitrust violation.[3] As to all other antitrust questions the FCC has only a collateral interest insofar as violations bear on an applicant's character qualifications. In considering applications before it, the FCC may refuse to examine the merits of pending antitrust actions involving the applicant but having no direct bearing on the particular application.

Appellant attempts to avoid the dismissal of its complaint, which inescapably flows from the district court's cogent analysis, by adverting to generalized conclusory allegations in the complaint of "a broad and continuing conspiracy, of which the exchange agreement was only one

3. The Commission itself followed this approach in the present case, when, in its letter requesting further information from the parties before approving the exchange, it said: "The Commission is also concerned as to whether National Broadcasting Company used its power to grant or withhold network facilities as an instrument to persuade Westinghouse to accept the proposed Philadelphia-Cleveland exchange. The Commission is additionally concerned with the problem of whether the acquisition by National Broadcasting Company of stations in Philadelphia and Westinghouse Broadcasting Company of stations in Cleveland would substantially lessen competition or tend to create a monopoly in the broadcasting field contrary to existing law."

step" (Jur. St. 12). Neither in the complaint nor in the jurisdictional statement is there even a remote hint as to the nature of any other acts performed in furtherance of or pursuant to the alleged general conspiracy. The district court should not retain jurisdiction to try an antitrust suit where the only act alleged to establish an illegal conspiracy is a perfectly lawful act performed pursuant to express governmental approval.[4]

The complaint alleges that the conspiracy "consisted of a continuing agreement and concert of action between the defendants FCA and NBC to obtain VHF television station ownership for NBC in five of the eight primary markets" (¶ 19 at p. 23 *infra*).[5] But the law is clear that NBC cannot acquire any station without approval of the FCC. If and when NBC should seek FCC authorization to secure a station in any other market, the Government, through the Department of Justice, will have full opportunity to oppose, as it concedes it had in connection with the present transaction (Stip. ¶ 12 at p. 15 *infra*). As in the present situation, the FCC cannot legally grant approval of any future application if the transaction involved constitutes a violation of the antitrust laws.

By alleging a continuing conspiracy to acquire additional stations in the future, appellant attempts to oust the FCC of its jurisdiction to pass on possible future transactions within the Commission's statutory jurisdiction. The Government's position in this case amounts to a bypassing of the Commission and the substitution of a federal district court in the Commission's statutory role as the arbiter of the public interest in the field of television licensing. A district court manifestly should not at this time consider

4. In its brief in the court below the Government frankly stated that, "If defendants' affirmative defenses have merit in law, this complaint should be dismissed now."

5. NBC's VHF television station ownership prior to the transaction here involved is described in paragraph 15 of the complaint, p. 22 *infra*.

whether the parties may be engaged in an agreement pursuant to which some time in the future they may conceivably apply to the FCC for approval of a transaction which the FCC would be required to deny because the transaction would contravene the antitrust laws. It is inconceivable that a court could now issue a blanket injunction against NBC's filing applications with the FCC in the future. Yet that would be precisely the effect of granting the Government's frank request that the court "require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets" (Jur. St. 6). It is strange, to say the least, that the FCC would support an interpretation of the law as authorizing a district court to enjoin the Commission from performing its express statutory duty to grant or refuse broadcast licenses in the exercise of its trained and specialized discretion.

The patent fallacy of appellant's position is perhaps fully demonstrated by the statement in the conclusion of its jurisdictional statement that appellees "for the purposes of this appeal, must be assumed to have violated" the Sherman Act. As a matter of law, however, the record conclusively demonstrates that NBC[6] has not violated the Sherman Act since admittedly it did only what the FCC authorized after full consideration of all the evidence relevant to the present antitrust issues.

II.

Appellant has stipulated that the Department of Justice was officially notified by the FCC of the pendency of the application for approval of the station exchange (Stip. ¶ 4 at p. 14 *infra*); that it conferred and exchanged information with the FCC relating to the transfer and was kept

6. The charge against RCA presumably is that it is the parent of NBC. If NBC has not violated the Sherman Act, clearly RCA has not.

fully informed of the evidence (¶ 11 at p. 15 *infra*), which included "all of the evidence relating to all of the antitrust issues presented by the complaint in this action" (¶ 7 at p. 14 *infra*); and that "the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At no time did the Department of Justice exercise any of these rights" (¶ 12 at p. 15 *infra*).

Relying on the FCC's approval, granted more than four months "after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features", the parties consummated a transaction which "involved not only an exchange of millions of dollars worth of property but $3,000,000 in cash, together with extensive changes in personnel, organization and operating procedures" (Opinion, Jur. St. 22).

On these conceded facts, Chief Judge Kirkpatrick concluded that appellant, as a litigant appealing to the discretion of the chancellor, was not entitled to equitable relief.

In so holding, the court followed the mandate of this Court in very similar situations. The court's action was in direct conformity with the express holding of this Court in **Hecht Co. v. Bowles**, 321 U. S. 321, 329 (1944), that the traditional concepts of equity jurisprudence applied to the Government's right to an injunction under the Emergency Price Control Act and that an injunction might accordingly be denied even if violation of the statute were clearly established.

Appellant's insinuation that the denial of equitable relief was based on "the time elapsed between the Commission's action and the filing of the complaint" (Jur. St. 14) is

a manifest distortion of the district court's action. What appellant chooses to ignore, but what the court found decisive, is the Justice Department's consistent and continued failure to oppose FCC approval of the challenged transaction,—despite the fact that the Department received prompt notification of and full information concerning its potential interest.

CONCLUSION.

The decision of the court below is clearly correct under long-established principles of law and equity.

The decision could not have any adverse effect on the Government's obligation to uphold and enforce the antitrust laws and the policy underlying them. FCC denial of an application has the same effect as a judicial injunction against the transaction involved, while FCC approval has absolutely no bearing on the Government's right to proceed in an antitrust suit in a district court on the basis of any transaction, past or future, other than the specific one which the FCC has found to be in the public interest.

On the other hand, the Government's position in the present case would impose on private industry an unreasonable, intolerable and unjustifiable burden. Persons who, like NBC in the present case, had followed all prescribed requirements of law and had submitted their activities to the full scrutiny of appropriate Government regulatory agencies, would live in constant insecurity based solely on the possibility that another Government agency belatedly might seek to enforce, in a different tribunal, its contrary view of what the public interest demands on the very same set of facts.

Unless the law is so clear as to admit no possible escape, it cannot be held that a private person may be so penalized

by governmental schizophrenia, particularly where no legitimate benefit to the national interest results and the Congress has provided a clear method of resolving intragovernmental conflicts without prejudice to the private citizen.

On both authority and reason, and as a matter of simple equity, the decision of Chief Judge Kirkpatrick dismissing the complaint is clearly correct. The present appeal, therefore, presents no substantial question for the decision of this Court, and the judgment of the district court should be affirmed.

Respectfully submitted,

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May 23, 1958.

APPENDIX A.

Stipulation.

The parties hereby stipulate to the following statement for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein, and for no other purpose, and stipulate that nothing contained in this stipulation shall be used as a basis for objection to the introduction of evidence at any trial of this action:

1. On May 16, 1955, National Broadcasting Company, Inc. ("NBC") entered into a written agreement with Westinghouse Broadcasting Company, Inc. ("WBC") under which, subject to the approval of the Federal Communications Commission ("FCC"), WBC would acquire the television and radio broadcasting facilities owned and operated by NBC in Cleveland, Ohio, NBC would acquire the television and radio broadcasting facilities owned and operated by WBC in Philadelphia, Pennsylvania, and NBC would pay WBC $3,000,000. This is the agreement referred to in paragraph 21 of plaintiff's complaint. A copy of the agreement is attached to this stipulation as Exhibit A.

2. Before the agreement referred to in the preceding paragraph could be consummated, WBC and NBC were required by the Communications Act of 1934 (the "Act") to obtain approval of the proposed exchange from the FCC. Applications for such approval had to be filed with the FCC in a prescribed form setting forth detailed information, including the terms of the transaction and each party's reasons for requesting the transfer. Both parties filed such applications for FCC approval of the exchange on June 15, 1955.

3. Upon the filing of the applications, the FCC instituted a proceeding (hereinafter referred to as the "exchange proceeding"). During the course of the exchange proceeding the FCC conducted an extensive investigation of the proposed exchange and of the negotiations leading to it, including interviews with all WBC and NBC officials involved in the transaction, and others, and a detailed examination of the files, records and other relevant material, and complete reports of the investigation were prepared.

4. On August 12, 1955, the FCC notified the Department of Justice, Antitrust Division, that the WBC and NBC applications for approval of the exchange were pending before the FCC and that possible antitrust questions were raised by these applications.

5. On October 17, 1955, the FCC issued letters, pursuant to Section 309(b) of the Act, to WBC and NBC stating the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the parties were requested to furnish additional information. Three of the seven members of the FCC, favoring immediate grant of the applications, voted against issuance of the letters. The majority, however, felt that the applications should not be approved without further information.

6. On November 16, 1955, WBC and NBC each filed answers to the FCC's 309(b) letters, furnishing detailed data. In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

7. In considering and acting on the exchange applications, the FCC had before it the detailed information contained in the applications, the results of its extensive investigation and analysis, and the information contained in

the lengthy and detailed answers by WBC and NBC to the 309(b) letters. The FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action.

8. In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws.

9. The FCC decided all issues relating to the exchange which it could lawfully decide.

10. On December 21, 1955, the FCC granted the exchange applications. Its action was a valid exercise of its jurdisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies. A copy of the public notice of the FCC action, issued December 28, 1955, including the separate statement of Commissioner Doerfer and the dissenting statement of Commissioner Bartley, is attached to this stipulation as Exhibit B.

11. Following the original notification to the Department of Justice on August 12, 1955 of the pendency of the exchange applications, the FCC and the Department of Justice conferred and exchanged information relating to the exchange, and the FCC kept the Department of Justice fully informed as to the evidence in the FCC's possession relating to the exchange and the status of the applications.

12. In the exchange proceeding, the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At

no time did the Department of Justice exercise any of these rights.

13. On January 22, 1956, acting in reliance on the FCC's determination, WBC and NBC effected the exchange as approved and authorized by the FCC.

/s/ Bernard M. Hollander,
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APPROVED this 1st day
of August 1957.

/s/ Kirkpatrick, *Ch. J.*

[Exhibits omitted.]

APPENDIX B.

Complaint.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, complains and alleges as follows:

I.

Jurisdiction and Venue.

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of that Act.

2. Each of the defendants transacts business and is found within the Eastern District of Pennsylvania.

II.

Definition of Terms.

3. As used herein:

(a) "Affiliate" means a television or radio station affiliated with a national television or radio broadcasting network.

(b) "Network time" means advertising time purchased on national networks of television or radio stations by national advertisers.

(c) "National spot advertising" means advertising time purchased on television or radio stations by national advertisers for broadcast during non-network time.

(d) "Local advertising" means advertising time purchased on television or radio stations by regional and local advertisers for broadcast during non-network time.

(e) "The eight primary markets" means the eight largest United States metropolitan areas in terms of both population and retail sales; namely, in order of size, New York City, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco, and Pittsburgh.

(f) "Major market" means one of the fifty largest United States metropolitan areas in terms of both population and retail sales.

(g) "Station group" means a group of television and radio stations, under common ownership or control, which are located in and serve different major markets.

III.

Defendants.

4. Radio Corporation of America (herein referred to as RCA) is hereby made a defendant. RCA is a corporation organized and existing under the laws of the State of Delaware. It is engaged in the manufacture, sale and distribution of a full line of the products, parts and accessories used in the transmission and reception of television and radio signals. RCA has total annual revenues of about $1,000,000,000.

5. National Broadcasting Company, Inc. (herein referred to as NBC) is hereby made a defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a wholly-owned subsidiary of defendant RCA, and is engaged in the business, among other things, of producing, selling and distributing television and radio programs and advertising. NBC furnishes network service to about 200 independent television stations and about 200 independent AM radio stations (and many com-

panion FM radio stations), as well as to the members of its owned and operated station group. The NBC station group consists of five very high frequency (herein referred to as VHF) television broadcasting stations, five standard amplitude modulation (herein referred to as AM) radio broadcasting stations, and four frequency modulation (herein referred to as FM) radio broadcasting stations. These stations are located in New York City, Chicago, Los Angeles, Philadelphia, San Francisco, and Washington, D. C. NBC has also acquired two ultra high frequency (herein referred to as UHF) television broadcasting stations in Buffalo, New York and New Britain, Connecticut. NBC acts as advertising sales representative for all members of its station group, as well as for some independently owned stations. Total revenues of NBC, including revenues from television and radio broadcasting, account for over 23% of RCA's total annual revenues.

IV.

The Trade and Commerce Involved.

6. The sale of advertising is essential to the operation of television and radio networks, station groups and broadcasting stations. Broadcast advertising is conveyed from the networks across state lines to television and radio stations throughout the United States, and is broadcast by television and radio stations across state lines to viewers and listeners throughout the United States.

7. Vigorous competition for national spot advertising and local advertising exists among networks, network station groups, independent station groups and independent stations. There is also competiton among the networks, and between the networks and independent representatives, for representation of independent stations and station groups in the sale of national spot advertising.

8. Broadcast advertising requires and results in a continuous stream of commercial intercourse across state lines, including the collection and payment of fees for the sale of broadcast time, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

9. Television networks originate network programming and advertising which they supply to broadcasting stations owned and operated by them and, pursuant to affiliation contracts, to broadcasting stations owned and operated by others. About 95% of all television stations in the United States are affiliated with one or more networks. Affiliation makes television station operations more profitable and is generally essential to the economic survival of television stations except in the three largest major markets. Time periods adjacent to popular network programs are particularly attractive to advertisers for local and national spot advertising. Station breaks, during which the broadcasting station is identified at regular intervals, provide valuable advertising for the station owner.

10. There are three national television networks: NBC, Columbia Broadcasting System (herein referred to as CBS), and American Broadcasting Company (herein referred to as ABC), each with about 200 affiliates. In 1954 the television broadcasting revenues of NBC and its owned stations were approximately $120,000,000, of CBS and its owned stations approximately $123,000,000, and of ABC and its owned stations approximately $44,000,000. In 1955 these revenues were approximately: NBC—$159,000,000, CBS—$153,000,000 and ABC—$54,000,000.

11. Television and radio stations are instrumentalities through which programs and advertisements are broadcast or transmitted across state lines to viewers and listeners in the respective market areas of such stations. In 1954 the

total revenue from the sale of broadcasting time on all United States television stations was approximately $538,122,000. Of such revenue, network time sales accounted for approximately $241,225,000 (45%), national spot advertising for approximately $176,766,000 (33%) and local advertising for approximately $120,131,000 (22%).

12. Products, parts and accessories used in the transmission and reception of television and radio signals are manufactured in many states of the United States and are sold and shipped by the manufacturers thereof, including RCA and Westinghouse Electric Corporation (herein referred to as Westinghouse Electric) in interstate commerce to wholesalers, retailers and other purchasers located in various states of the United States.

13. Philadelphia is the fourth market in the United States in terms of both population and retail sales. In this market, there are three VHF television stations: WRCV-TV (formerly WPTZ), owned and operated by and affiliated with NBC; WCAU-TV, owned by WCAU, Inc. and affiliated with CBS; and WFIL-TV, owned by Triangle Publications, Inc. and affiliated with ABC. RCA-Victor, the RCA manufacturing division, has its headquarters in Camden, New Jersey, and some of its largest plants are in the Philadelphia market area. Westinghouse Electric also has large plants in that area. Large quantities of the products, parts and accessories described in paragraph 12 of this complaint are produced by manufacturers, including RCA and Westinghouse Electric, in the Philadelphia market area, and from there are shipped to and sold in states of the United States other than the state of their manufacture.

14. Cleveland is the tenth market in the United States in terms of both population and retail sales.

V.

Background of the Offenses Charged.

15. In February 1954, the defendant NBC owned and operated the following VHF television stations:

WRCA-TV	New York	(market 1)
WNBQ	Chicago	(market 2)
KRCA	Los Angeles	(market 3)
WNBK	Cleveland	(market 10)
WRC-TV	Washington, D.C.	(market 11)

16. In August 1954, Westinghouse Broadcasting Co., Inc. (herein referred to as WBC), a wholly-owned subsidiary of Westinghouse Electric, owned and operated the following VHF television stations:

WPTZ	Philadelphia	(market 4)	NBC Affiliate
WBZ-TV	Boston	(market 6)	NBC Affiliate
KPIX	San Francisco	(market 7)	CBS Affiliate

WBC also was an applicant for VHF stations in Pittsburgh (market 8) and Portland, Oregon (market 20). WBC was the only non-network station owner with three VHF stations in markets 4 through 7. In this capacity, it was an important competitor of defendant NBC and other station owners for advertising in the eight primary markets.

17. Prior to December 1954, Allen B. DuMont Laboratories, Inc. owned and operated WDTV, the only VHF station in Pittsburgh, Pennsylvania (market 8), which station carried some programs of each of the networks CBS, ABC and the defendant NBC. On or about December 3, 1954, DuMont sold this station to WBC.

VI.

Offenses Charged.

18. Beginning about March 1954, and continuously thereafter to the date of the filing of this complaint, the de-

fendants RCA and NBC have been engaged in an unlawful combination or conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

19. The aforesaid combination or conspiracy has consisted of a continuing agreement and concert of action between the defendants RCA and NBC to obtain VHF television station ownership for NBC in five of the eight primary markets by the unlawful use of the power of the defendant NBC, as a network, to grant to or withhold from non-network station owners, NBC network affiliation for their television stations.

20. Defendants RCA and NBC have effectuated this combination or conspiracy in part by depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market by the following means:

(a) Threatening to cancel or to refuse to renew WBC's affiliation with NBC in Boston and Philadelphia if WBC refused to negotiate with NBC for the transfer of its VHF station in Philadelphia to NBC;

(b) Withholding affiliation with NBC for a VHF station about to be acquired by WBC in Pittsburgh, until WBC agreed to transfer its VHF station in Philadelphia to the defendant NBC;

(c) Threatening to withhold affiliation with NBC for WBC's fifth VHF and two UHF stations when acquired.

21. On or about May 16, 1955, defendant NBC entered into a contract with WBC in unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act. This contract provided that:

(a) NBC would acquire the WBC television and radio broadcasting facilities in Philadelphia;

(b) WBC would acquire the NBC television and radio broadcasting facilities in Cleveland;

(c) NBC would pay WBC $3,000,000.

On or about January 21, 1956, WBC and the defendant NBC exchanged the aforesaid facilities pursuant to this contract.

22. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

23. The effects of the aforesaid offenses, among others, have been and are:

(a) To reduce the ability of WBC as a station owner to compete with NBC and other station owners for the sale of advertising;

(b) To preclude competition among independent advertising representatives for representation of one of the VHF stations in the Philadelphia market;

(c) To preclude competition among station owners in the Philadelphia market for NBC network affiliation; and

(d) To reduce the ability of Westinghouse Electric to compete with RCA and others in the sale of equipment for the transmission and reception of radio and television signals.

Prayer.

WHEREFORE, plaintiff prays:

1. That the aforesaid combination or conspiracy and the aforesaid contract of May 16, 1955 be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That pursuant to the authority granted it by Section 4 of the Sherman Act, and by Section 313 of the Communications Act of 1934, as amended (47 U. S. C. § 313), the Court order such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate.

3. That the plaintiff have such other and additional relief as may be proper.

4. That the plaintiff recover the costs of this suit.

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/s/ W. Wilson White
W. WILSON WHITE
United States Attorney

IN THE

Supreme Court of the United States

October Term, 1958.

No. 54.

UNITED STATES OF AMERICA,
Appellant,

v.

RADIO CORPORATION OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES.

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INDEX TO BRIEF FOR APPELLEES.

INDEX TO BRIEF FOR APPELLEES (Continued).

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

TABLE OF STATUTES AND AUTHORITIES CITED.

TABLE OF STATUTES AND AUTHORITIES CITED (Continued).

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 54.

UNITED STATES OF AMERICA,

Appellant,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES.

STATUTES INVOLVED.

The statutes involved are Sections 1 and 4 of the Sherman Act [26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1 and 4 (1952)] and Sections 310(b) and 313 of the Communications Act of 1934 [48 Stat. 1064, as amended, 47

U. S. C. §§ 151 *et seq.* (1952)], which are set forth in appellant's brief, at pages 2, 4-5 and 5-6, respectively.[1]

In addition, the case involves Sections 309(a), (b) and (c), 402(b) and 405 of the Communications Act. The text of those sections is set forth in Appendix A to this brief.

COUNTERSTATEMENT OF THE QUESTION PRESENTED.

Where the Government has entered into a Stipulation, approved by the court below, providing:

> (1) that in a broadcast license transfer proceeding, the Federal Communications Commission (a) had before it all of the evidence relating to all of the antitrust issues in the present suit, (b) had a duty to and did consider whether the evidence showed any violation of the antitrust laws, and (c) made a valid, final order authorizing the station acquisition which the Government here seeks to set aside; and
>
> (2) that the Government failed to exercise its rights to contest issuance of the Commission order and to seek judicial review thereof by the exclusive means provided by statute—

may the Government maintain this antitrust suit, brought more than a year after the Commission authorization, seeking to invalidate the acquisition admittedly made in reliance on such authorization?

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1. Sections 221(a) and 222(c)(1) of the Communications Act, which are reprinted in appellant's brief (pp. 3-4), but not in its Jurisdictional Statement, are not involved in the present case since they have no bearing on radio or television broadcasting, the only subject matter with which this case is concerned.

COUNTERSTATEMENT OF THE CASE.

Introductory Statement.

This case was presented to and decided by the district court on the basis of a Stipulation,[2] the text of which is reproduced as Appendix B to this brief.

The determination to have the narrow legal issue involved in this appeal decided preliminarily, in advance of trial, was made at a pretrial conference (R. 105-137) as a result of a motion filed by appellant (R. 101-102). Appellant urged that the issue could be decided solely on the basis of admitted facts concerning the FCC proceedings culminating in approval of the station exchange transaction which is the basis of this suit (R. 106-107, 109).

After a month of work under the supervision of the district court (R. 136), the parties evolved a Stipulation setting forth the relevant facts, and the district court approved the Stipulation (R. 140). As the opinion below stated: **"All facts relevant to the motion** now before the Court have been stipulated" (R. 195).[3]

Now, after the decision in the district court, rendered on the basis of the procedure agreed to by the parties, appellant seeks to avoid the narrow legal issue which it tendered below. Despite the carefully-drawn and court-approved Stipulation of the facts, appellant devotes more than half of its Statement[4] to the "facts alleged by the

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2. The Stipulation appears in the Record at R. 137-140; the exhibits to the Stipulation appear at R. 140-165.

3. Wherever boldface type is used in this brief, the emphasis is ours.

4. The "Statement" in appellant's brief is in marked contrast to that contained in its Jurisdictional Statement (pp. 5-8), which, in the main, was limited to matter properly before this Court and relevant to the legal issue presented.

Government" (p. 7), blandly stating that such allegations are drawn from the complaint, appellant's "answers to the defendants' interrogatories", and appellant's "motion for production of documents" (p. 7, n. 1).[5] In contrast, a single sentence (pp. 10-11) of appellant's six-page Statement is deemed sufficient by appellant to state all the facts in the 13 numbered paragraphs of the Stipulation adopted "for the purpose of any determination of the merits of defendants' * * * defenses" (R. 137). Appellant is obviously attempting to subordinate the Stipulation, and to escape its legal result as determined by the court below, by injecting into this appeal, for the first time, irrelevant material which gives a false perspective of the case.

We deem it essential to invite this Court's attention to the fact that most of the statements on pages 7 through 9 of appellant's brief do not appear in the Stipulation. None of the assertions there made was presented to or passed upon by the court below, and of course appellees have not admitted any such assertions by appellant for any purpose whatever. This case was decided, and is before this Court, not on a motion to dismiss in the nature of a common law demurrer, but solely for determination of the legal question whether maintenance of the action is precluded by the facts as stipulated.

The only material before Chief Judge Kirkpatrick in rendering his decision on appellant's motion for preliminary hearing, and thus the only material properly before

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5. Entirely apart from the fact that the answers to interrogatories are outside the Stipulation, a party is not permitted to rely on its own answers to interrogatories. **Haskell Plumbing & Heating Co. v. Weeks**, 237 F. 2d 263, 267 (9th Cir. 1956); 4 **Moore, Federal Practice** 2341-2342 (2d ed. 1950). A fortiori it is also improper for a party to seek to rely on its own motion for production of documents. An example of such unwarranted and improper procedure by appellant may be found in connection with its assertions (pp. 7-8) concerning RCA's alleged interest in the acquisition, the sole authority cited by appellant (p. 8) being its own Rule 34 motion printed at R. 20.

this Court on appeal from that decision, consists of the complaint (R. 1-8) and the answer (R. 27-33) to define the issues, and the Stipulation to state the facts "for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses" (R. 137).[6]

In a similar situation, this Court, in **Schley v. Pullman Car Co.**, 120 U. S. 575, 578 (1887), speaking through Mr. Justice Harlan, said:

> "* * * Notwithstanding the agreement, that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things * * * wholly unsustained by anything in the record. * * * The excuse given for this breach of professional propriety is 'the extreme brevity of the record.' But it is the same record upon which counsel for the company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation, much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which, he must have known, could not be taken into consideration. * * *"[7]

Under these circumstances, we feel constrained to present the "concise statement of the case containing all that

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6. Chief Judge Kirkpatrick of course had the benefit of briefs and oral argument by the parties and of a brief by the FCC as amicus curiae.

7. The 204 page Transcript of Record contains a great deal of irrelevant material. The inclusion of such material in the printed transcript does not justify an appellate court in considering it. **United States v. City of Brookhaven**, 134 F. 2d 442, 447 (5th Cir. 1943). See also **Dollar v. Land**, 154 F. 2d 307, 312 (D. C. Cir. 1946), *aff'd*, 330 U. S. 731 (1946); **Singer Mfg. Co. v. Golden**, 171 F. 2d 266, 267 (7th Cir. 1948); **United States v. International Boxing Club**, 123 F. Supp. 575 (S. D. N. Y. 1954).

is material to the consideration of the questions presented" provided for by the rules of this Court [Rule 40(2)(e)].

The Proceedings Below.

This case originated in a complaint filed by the United States in the United States District Court for the Eastern District of Pennsylvania on December 4, 1956 under Section 4 of the Sherman Act [26 Stat. 209 (1890), as amended, 15 U. S. C. § 4 (1952)].

The complaint charged that Radio Corporation of America (RCA) and its wholly owned subsidiary, National Broadcasting Company, Inc. (NBC), were engaged in a conspiracy, combination or agreement "to obtain VHF television station ownership for NBC in five of the eight primary markets" (R. 6). The only act averred as having been performed in effectuation of the alleged conspiracy or combination was an agreement entered into and consummated by Westinghouse Broadcasting Co., Inc. (WBC) and NBC under which NBC acquired the WBC television and radio broadcasting facilities in Philadelphia (WPTZ and KYW), in exchange for NBC's facilities in Cleveland (WNBK, WTAM and WTAM-FM), plus $3,000,000 cash (R. 7).

The relief requested, as stated at pages 9-10 of appellant's brief, was that "the court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia stations; revoke the station licenses; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets."

Appellees filed a joint answer (R. 27-32) responding to the complaint paragraph by paragraph and denying any violation of law, contending that the complaint fails to state a claim upon which relief can be granted, and setting forth three additional affirmative legal defenses. These

three defenses were based on the proceedings before the FCC which had culminated in the FCC's granting the applications filed by WBC and NBC for FCC authority to consummate the station exchange and on the failure of the Department of Justice to take any steps in the proceeding.

On May 31, 1957, appellant filed a motion under Rule 12(d) of the Federal Rules of Civil Procedure for a preliminary hearing on appellees' defenses based on the FCC approval of the exchange applications (R. 102).

Because of appellant's insistence on preliminary disposition, Chief Judge Kirkpatrick suggested at a pretrial conference that the facts relevant to the narrow legal issue presented be set forth in a stipulation. Appellees agreed to pursue this procedure "if we can have the agreement of the Government to a stipulation of fact which we think would present to the Court the full story" (R. 112).

Pursuant to this understanding the parties entered into a Stipulation "for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein." The Stipulation was approved by the court on August 1, 1957 (R. 137).[8]

The case was argued before Chief Judge Kirkpatrick on November 26, 1957 (R. 167). On January 10, 1958, he filed his "Opinion Sur Motion Under Rule 12(d) to Determine the Sufficiency of Certain Defenses" (R. 194-199) in which he ruled that the FCC approval of the station exchange constituted both a jurisdictional (R. 195-197) and a substantive (R. 197-198) bar to the present antitrust suit and that, in any event, general principles of equity precluded maintenance of the action (R. 198-199).

8. Appellees then filed a motion to dismiss for lack of jurisdiction or for summary judgment on the basis of the FCC approval of the exchange transaction (R. 165-166).

The Facts.

The facts relevant to the present appeal, as contained in the parties' Stipulation, are as follows:

The agreement between WBC and NBC (R. 140-151) provided that, subject to FCC approval (R. 150), NBC would acquire WBC's television and radio facilities in Philadelphia in exchange for NBC's television and radio facilities in Cleveland plus $3,000,000 in cash. The agreement was dated May 16, 1955 (S. 1).[9]

Under the Communications Act of 1934 (47 U. S. C. §§ 151 *et seq.*), the exchange could not take place except upon order of the FCC approving it after a finding that the exchange would serve the public interest. 47 U. S. C. § 310(b). Both WBC and NBC filed applications for FCC approval on June 15, 1955. As required by Section 308(b) of the Act, these applications set forth detailed information concerning the qualifications of WBC and NBC, the nature and terms of the proposed transaction, and each applicant's reasons for requesting approval of it (S. 2).

The FCC conducted an extensive investigation of the proposed station exchange, including the negotiations leading to it. Among other things, the FCC interviewed the WBC and NBC officials involved, as well as all other persons who might have relevant information, and examined in detail all documentary material relating to the transaction. Complete reports of this investigation were prepared and considered by the Commission (S. 3, 7).

On August 12, 1955, the FCC notified the Antitrust Division of the Department of Justice that the exchange applications were pending and that they raised possible antitrust questions (S. 4). Thereafter, the FCC kept the Justice Department fully informed as to the evidence in

9. "S." references are to paragraph numbers of the parties' Stipulation (R. 137), set forth in Appendix B to this brief.

its possession relating to the exchange and of the status of the WBC-NBC applications (S. 11).

In October of 1955, the FCC formally reviewed the exchange applications. Three of the seven Commissioners favored an immediate grant of these applications, but the majority felt that the FCC should have further information before taking final action. The Commission's Secretary was therefore directed to issue letters to WBC and NBC pursuant to Section 309(b) of the Communications Act. These letters stated the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the FCC requested further information (S. 5).

WBC and NBC separately answered these inquiries, furnishing detailed data. These replies were filed under cover of a joint letter of transmittal, dated November 10, 1955, in which WBC and NBC urged the FCC to approve the exchange of stations as being in the best interests of both companies and consistent with the public interest (S. 6).

The record before the FCC was complete. It included, among other things, all of the evidence relating to all of the antitrust issues presented by the complaint in this action (S. 7).

In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws (S. 8). On December 21, 1955, the FCC approved the exchange as being in the public interest (S. 10). Its aproval was a valid exercise of its jurisdiction and was in accordance with the Communications Act and the FCC's own rules, regulations and policies (S. 10).

Appellant had the right to participate formally in the proceedings before the FCC and to oppose the FCC's ap-

proval of the exchange on the same grounds as those upon which appellant now seeks to have the district court invalidate the NBC acquisition. Appellant admits that it had this right but did not exercise it. Nor did it pursue any of the administrative or judicial remedies admittedly available to it for obtaining an administrative hearing, administrative reconsideration or judicial review of the FCC's decision (S. 12).

Acting in reliance on the FCC's approval, WBC and NBC effected the exchange on January 22, 1956 (S. 13).

SUMMARY OF ARGUMENT.

1. The Communications Act of 1934 expressly declares that the antitrust laws are applicable to broadcast regulation. Thus, unlike some regulatory agencies, the FCC is prohibited from authorizing any transaction in the broadcast industry which would contravene the antitrust laws.

The parties have stipulated that when the FCC approved and authorized the WBC-NBC station exchange, which is the subject of this suit, it had before it all of the evidence now relied on by appellant and had a duty to and did consider whether that evidence showed any violation of the antitrust laws. The FCC's finding that the station exchange was in the public interest necessarily included a finding that the transaction did not constitute a violation of the antitrust laws.

The Sherman Act prohibits only unreasonable restraints of trade, and the question of reasonableness is one to be determined in light of the facts peculiar to the particular industry involved. Such a fact determination is entirely appropriate for the FCC. It would be unrealistic to suppose that Congress would make the antitrust laws a fundamental ingredient of the public interest in broadcasting, would charge the FCC with the duty of deciding whether a particular transaction is in the public interest, and would then bar the FCC from determining antitrust questions in making its finding that the transaction is in the public interest.

Thus, the FCC's determination that the transaction here involved was in the public interest, in the absence of a reversal by the Court of Appeals for the District of Columbia in a statutory review proceeding, should end the matter. Conversely, if the FCC had determined that the transaction did violate the antitrust laws, the result sought by the present action would have been achieved by the FCC's denial, without subjecting appellees to the crossfire of two different arms of government.

The decision below does not rest upon any theory of "exemption" or "immunity" from the antitrust laws. On the contrary, that decision recognizes that an FCC license will not free the licensee from accountability for violations arising from misuse of the license or from any conduct not subject to FCC licensing jurisdiction. But it also recognizes that when an alleged violation consists of the very transaction covered by a license application, the FCC has a duty to prevent that violation and that accordingly its determination that a grant of the application is in the public interest should lay to rest the antitrust questions.

2. Any contention that a transaction approved by the FCC in and of itself violates the antitrust laws is necessarily an attack on the propriety of the FCC's public interest finding. But the exclusive statutory method of testing the propriety of an FCC order is by review in the Court of Appeals for the District of Columbia.

Decisions of this Court establish the principle that an administrative order may not be reviewed by any court other than the one given statutory jurisdiction to review such an order.

The fundamental principle of this Court's primary jurisdiction decisions, recognizing the primacy of administrative agency jurisdiction over that of courts in determining issues of public interest and reasonableness, applies to a collateral judicial proceeding following the adminis-

trative proceeding. In such a case, the primary jurisdiction doctrine gains added vitality from the general principles underlying such doctrines as administrative finality, collateral estoppel and res judicata.

These principles are designed to achieve the common goal of preservation of the role of administrative agencies in our scheme of government. As the court below expressed it, dismissal for lack of jurisdiction was required by this "policy * * * so deeply imbedded in our law and the [compelling] reasons on which it is based" (R. 196).

3. The fact that this is a Government antitrust case does not change the principles which govern the granting of equitable relief. Under the facts of this case, it would be grossly inequitable to subject appellees to the drastic relief here sought because of a conflict of action between two arms of Government.

The parties pursued the statutory procedure for FCC approval of the transaction. In reliance on the FCC's valid approval, the parties made substantial expenditures and changes of position.

Fifteen months before the present suit was started, the FCC had notified the Department of Justice of the applications for approval of the transaction and had kept the Department fully informed of the evidence in the FCC's possession. The applications were not approved until more than four months after the original notification to the Department, and the transaction was not consummated until expiration of the statutory period for appeal of the FCC approval. Almost a year elapsed between the FCC order and the filing of the complaint in this case.

If appellant had pursued the prescribed administrative procedure for determination of its present contentions, the Government's interests would have been fully protected without subjecting the parties to the serious injustice of two proceedings, in the second of which they are called upon to defend action expressly authorized in the first and to expose themselves to possible severe loss.

Argument.

I.

THE FCC APPROVAL OF THE EXCHANGE TRANSACTION PRECLUDES A FINDING THAT THIS TRANSACTION VIOLATED THE ANTITRUST LAWS.

A. In Determining That the Exchange Transaction Was in the Public Interest, the FCC Necessarily Found That It Did Not Violate the Antitrust Laws.

The keystone of the holding below is found in the following passage from Chief Judge Kirkpatrick's opinion (R. 197):

> "* * * The FCC requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the FCC decided all issues relating to the exchange which it could lawfully decide. **There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States.** * * *"

This holding inevitably follows from the regulatory pattern adopted in the Communications Act. Unlike some regulatory statutes, in which administrative agencies have been authorized to approve and to exempt from the antitrust laws transactions which might otherwise constitute

monopolies or unreasonable restraints of trade,[10] the Communications Act makes the antitrust laws fully applicable to transactions within FCC's jurisdiction over the broadcasting industry. The contrast between the pattern of broadcast regulation and that of some industries, *e.g.*, railroads, was spelled out by Mr. Justice Roberts in **Federal Communications Comm'n v. Sanders Radio Station**, 309 U. S. 470, 474 (1940), as follows:

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads * * *."

In unmistakable language, Section 313 of the Communications Act declares that all the antitrust laws are "applicable * * * to interstate or foreign radio communications". In fact, as this Court has stated, furtherance of the national policy embodied in the antitrust laws was a major consideration which led Congress to confer on the FCC regulatory power over the broadcast industry. In **Federal Communications Comm'n v. Pottsville Broadcasting**

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10. *E.g.*, § 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952); §§ 5(11), 5a(9) of the Interstate Commerce Act, 24 Stat. 380 (1887), 62 Stat. 472 (1948), as amended, 49 U. S. C. §§ 5(11), 5b(9) (1952).

Sometimes Congress has achieved this result by having the regulatory statute supersede the antitrust laws pro tanto. *E.g.*, § 15A(n) of the Securities Exchange Act of 1934, added in 1938, 52 Stat. 1070, 15 U. S. C. § 780—3(n) (1952).

Co., 309 U. S. 134, 137 (1940), Mr. Justice Frankfurter said for the Court:

> "* * * By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. * * *
>
> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. * * *"

Because of the express command in the first sentence of Section 313, the Commission cannot make the affirmative finding required by Section 310(b) that "the public interest, convenience and necessity will be served" by a license transfer unless it is satisfied that the transaction does not offend the fundamental prohibition against unreasonable restraints of trade. If the Commission were to find that "the public interest, convenience, and necessity will be served" by a transaction which the evidence established was in unreasonable restraint of trade, its action could be set aside by the Court of Appeals for the District of Columbia in a statutory review proceeding under Section 402 of the Act.

The present case demonstrates the Commission's recognition of its statutory obligation to satisfy itself that the transaction it approves does not violate the antitrust laws.

Appellant has stipulated that "in considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws" (S. 8 at R. 139). Upon this evidence—which concededly is precisely the same evidence now relied on by appellant (S. 7 at R. 139)—the FCC then made the affirma-

tive finding of public interest, convenience and necessity requisite for approval of the application.

The express provisions of the FCC's rules emphasize the Commission's concern for the protection of competition in the broadcast field. See, *e.g.*, Sections 3.136, 3.35, 3.636(a) and 3.636(b) of the FCC's Rules and Regulations [47 Code Fed. Regs. §§ 3.136, 3.35, 3.636(a), 3.636(b) (1958)].

The FCC has been particularly alert to the antitrust problems raised by the acquisition and ownership of stations in circumstances which might lead to an undue concentration of economic control. With respect to television broadcast stations, FCC rules specifically prohibit the ownership of more than five VHF stations by the same person. The rule, 47 Code Fed. Regs. § 3.636 (1958), provides that even within the limit of five, no additional television station will be granted to any existing licensee—

> "* * * if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area, served, the number of people served and the extent of other competitive service to the area in question. * * *"

Whether a broadcast license transaction constitutes an unreasonable restraint of trade raises a complex factual issue involving specialized knowledge of the industry. The Sherman Act prohibits only those restraints of trade which are unreasonable. Reasonableness is not a concept determinable by application of a mechanical or mathematical formula. On the contrary, it is always a complicated question of fact dependent upon the multitude of facts involving the industry as a whole.

As this Court has repeatedly stated, what constitutes an unreasonable restraint of trade must be judged in the light of "the facts peculiar to the business" involved. **Chicago Board of Trade v. United States**, 246 U. S. 231, 238 (1918). It is the existence of the myriad of these facts which calls for the creation of a specialized agency to administer the law applicable to a particular business or industry. As Mr. Justice Frankfurter said for the Court in **Federal Communications Comm'n v. RCA Communications, Inc.**, 346 U. S. 86, 96 (1953):

> "* * * To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.'" *Far East Conf. v. United States*, 342 U. S. 570, 575. * * *"

There is no question to which "specialization" and "insight gained through experience" are more relevant and essential than that involving the broad and relatively amorphous concept of "unreasonable restraint of trade" viewed in light of the "facts peculiar to the business." It would be unrealistic to suppose that Congress would vest licensing authority in a specialized regulatory agency and expressly make the antitrust laws applicable to the exercise of that authority, but in the same breath deprive that agency of the power to determine the basic question whether transactions requiring its approval constitute unreasonable restraints of trade in the regulated industry.

The FCC's obligation to foster the public interest requires the utilization of broad knowledge, far beyond "technical and engineering" considerations. **National Broadcasting Co. v. United States**, 319 U. S. 190, 216-217 (1942) (sustaining FCC's network regulations designed to

effectuate the national policy embodied in the antitrust laws).

In the administration of the Communications Act, and in the exercise of its licensing functions under the Act, the FCC has exclusive jurisdiction. Its conclusions and determinations as to the public interest, including the substantive provisions of the antitrust laws as an essential element thereof, are final and conclusive. If it finds as a condition to its approval, as it must under Section 313 of the Act, that a transaction is not in unreasonable restraint of trade, and that determination is not reversed by the Court of Appeals for the District of Columbia, that is the end of the matter. If, on the other hand, the FCC should find that a particular transaction does constitute an unreasonable restraint of trade, it would be required under Section 313 to deny approval. That denial would prevent consummation of the offending transaction, thus achieving precisely the same result as an injunction, but without presenting the unseemly spectacle of making a private party the target of the crossfire of two opposing arms of government.

B. No Question of Antitrust "Immunity" or "Exemption" Is Involved.

Section 313 makes amply clear that a broadcast license is not a license to violate the antitrust laws. If a licensee, in the conduct of its broadcast business (or any other business), should violate the antitrust laws, it would, of course, be fully amenable to enforcement action instituted by the proper enforcement agencies. For example, if a licensed broadcaster should charge an advertiser premium advertising rates because the advertiser also utilized a competitive medium, or if the broadcaster in conspiracy with a favored customer should refuse to sell advertising time to a competitor of the favored customer, the Department of Justice could readily maintain antitrust proceedings against the

broadcaster in a district court. As Chief Judge Kirkpatrick succinctly stated (R. 197), the congressional intention was—

> "that a grant of a license would not free a licensee from accountability in the courts for subsequent violations of the antitrust laws arising from the misuse of the powers acquired by the license."

In **Packaged Programs v. Westinghouse Broadcasting Co.**, 255 F. 2d 708 (3d Cir. 1958), referred to by appellant (p. 28), the plaintiff charged WBC with using its dominant position as the owner of the only VHF television station in Pittsburgh to further its interest in the production and sale of program material. Since the FCC does not have jurisdiction to license the production and sale of program material, the Court of Appeals properly held that a private antitrust suit could be maintained.

The **Packaged Programs** decision is thus a complete refutation of appellant's argument that Chief Judge Kirkpatrick's decision amounts to a ruling that a broadcast license grants an "exemption" or "immunity" from the antitrust laws and renders Section 313 nugatory.

The decision below is in no way inconsistent with **United States v. Borden Co.**, 308 U. S. 188 (1939), so heavily relied on by appellant. There, the agency had not acted and was not required to act. Thus, the antitrust indictment before the Court did not, as does the present case, involve an attempted collateral attack on conduct which was within the mandatory jurisdiction of an administrative agency. **Borden's** holding that antitrust exemptions are not to be implied has no bearing here, because the present case does not involve any theory of exemption.

It serves no useful purpose to engage in a verbal joust as to whether the FCC "enforces" the antitrust laws. Admittedly, the FCC cannot institute antitrust suits. But it necessarily has the power and duty to prevent antitrust

violations within its jurisdiction by denying applications for approval of transactions which constitute such violations; otherwise Section 313 of the Communications Act would be meaningless. On the other hand, if the FCC determines that a proposed transaction within its jurisdiction is in the public interest, it thereby of necessity determines that the transaction does not violate the antitrust laws, and therefore there is no occasion for "enforcement" action.

Appellees do not now claim and they have never claimed "immunity" in the present case; they do not now contend, and they never have contended, that the FCC had the power to authorize the transfer if it violated the antitrust laws or to authorize NBC to operate its stations in violation of the antitrust laws. Appellees' contention is simply that, as a matter of law, the antitrust laws are expressly made binding on the FCC and that therefore when the FCC finds that an act such as the license transfer here involved will further the public interest, convenience and necessity it necessarily finds that that act is not in violation of the antitrust laws.

C. The 1952 Legislative History Supports the Decision Below.

The legislative history of the 1952 amendment to the Communications Act reinforces the decision of the court below. Until 1952, Section 311 provided that:

> "* * * The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade * * *."

This provision served no purpose other than to make express the rule heretofore discussed that licensed broadcasters are not per se exempt from prosecution for violation of the antitrust laws. There is nothing in the language of the provision quoted which even remotely suggests that Congress adopted that provision to cover situations in which the FCC might, in flat contravention of Section 313, approve a transaction which was violative of the antitrust laws. On the contrary, Congress expressly provided a right of appeal to the Court of Appeals for the District of Columbia clearly broad enough to enable that court to set aside an order approving a transaction violative of the antitrust laws.

Thus, the quoted provision originally contained in Section 311 was directed to the type of situation presented in the **Packaged Programs** complaint (*supra*, 255 F. 2d 708), in which a broadcaster commits antitrust violations in connection with transactions not licensed by the FCC. The provision was not concerned with a situation like the present, in which the alleged antitrust violation, if any, would consist solely of the very transaction approved and authorized by the FCC.

The Conference Report on the bill which deleted this provision from the Act described it as "surplusage" [H. R. Rep. No. 2426, 82d Cong., 2d Sess. 19 (1952)]. The first sentence in Section 313 expressly made the antitrust laws applicable to radio communications and nothing in the Act either expressly or impliedly gave the FCC power to nullify or supersede the antitrust laws.

But this does not mean, as appellant contends, that Congress, either before or after the 1952 amendment, intended that a district court should reexamine an FCC determination that a specific license transfer is consistent with the public interest, convenience and necessity and therefore not violative of the antitrust laws.

The fact that Section 313 permits a court to revoke a broadcast license as an additional penalty in an antitrust

suit in no way conflicts with this conclusion. Broadcasters are clearly subject to the antitrust laws. If a broadcaster violates those laws in a field outside the FCC's jurisdiction, or in a situation where the FCC has no opportunity or duty to decide whether the particular conduct in question is consistent with the public interest, then either the Government or a private individual may attack such conduct in an antitrust suit in a district court. What the revocation provision of Section 313 means is that if the Government brings such an action, and if the facts justify a drastic remedy, then the Court may—in addition to other appropriate penalties—direct the revocation of the broadcast licenses held by the defendant.

The Senate Report [Sen. Rep. No. 142, 82d Cong., 1st Sess. 9 (1952)], quoted in appellant's brief (pp. 30-32, n. 12), shows clearly that Congress was deeply concerned that persons should not be "subject to trial for the same allegations before two different tribunals". The present suit is an attempt by appellant to subject NBC to trial before the district court of precisely the same antitrust questions and on precisely the same evidence as were fully presented to and considered by the FCC. Thus, if the legislative history referred to by appellant has any significance at all, it sustains appellees' position that under the circumstances here stipulated this antitrust suit cannot be maintained.

The protection against multiple and conflicting rulings by different arms of government with respect to a single transaction goes to the heart of the present case. The decision below affords such protection by providing a single forum in which the Government may implement the policy of the antitrust laws with respect to a transaction requiring administrative agency approval.

II.

THE DISTRICT COURT LACKS JURISDICTION TO SET ASIDE OR ANNUL THE ACTION TAKEN PURSUANT TO FCC AUTHORIZATION.

A. The Present Suit Is an Impermissible Collateral Attack on FCC Action and Is Barred on Grounds of Administrative Finality.

As shown in Point I of this brief, FCC approval of a transaction necessarily includes a finding that the transaction does not contravene the ingredient of public interest which is articulated in the antitrust laws. Any contention that a duly approved transaction in and of itself constitutes an unreasonable restraint of trade therefore necessarily charges that the FCC committed error in making its finding of public interest, convenience and necessity. Being an attack on the Commission's action, the contention can be considered only by the Court of Appeals for the District of Columbia in a review proceeding under Section 402(b) of the Act.

Section 402(b) provides that "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia * * *." That this is the **exclusive** method of testing the validity of FCC orders is conceded in appellant's brief (p. 20) and is well established by cases such as **Black River Valley Broadcasts, Inc. v. McNinch,** 101 F. 2d 235 (D. C. Cir. 1938), *cert. denied,* 307 U. S. 623 (1939). There, plaintiff sued in the district court to have an order of the FCC declared invalid and to enjoin enforcement of it. The district court dismissed for lack of jurisdiction. The court of appeals unanimously affirmed in an opinion by Judge (later Mr. Chief Justice) Vinson, stating in part (pp. 237-238):

> "In the [Communications] act, Congress has made this court the sole appellate body (with the right to

petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. **It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases.** * * *"

It follows that the present attempt to have a district court (1) determine that the very transaction approved by the FCC constituted an unreasonable restraint of trade, and (2) without any facts other than those passed on by the FCC in approving the transaction, prohibit NBC from operating under the license which the FCC has authorized it to hold, clearly constitutes an impermissible collateral attack on the Commission's order.

This analysis of the true nature of the present action closely accords with that adopted by this Court as recently as June of this year in **Tacoma v. Taxpayers of Tacoma,** 357 U. S. 320 (1958).

Reduced to its legal essentials, the **Tacoma** case involved the issue whether a state court could, by construing and applying state law, prevent a city from taking action authorized by the Federal Power Commission. The State of Washington had appeared in opposition in the proceedings before the Commission [**City of Tacoma,** 92 P. U. R. (n.s.) 79 (FPC 1951)], had unsuccessfully appealed to the Court of Appeals for the Ninth Circuit [**Washington v. Federal Power Comm'n,** 207 F. 2d 391 (1953)], and had unsuccessfully petitioned this Court for certiorari [347 U. S. 935 (1953)]. Thereafter, the state secured a state court declaration that under state law the city was without power to execute the project authorized by the FPC [**Tacoma v. Taxpayers of Tacoma,** 49 Wash. 2d 781, 307 P. 2d 567 (1957)].

This Court reversed the action of the Washington court on the ground that the state court action had involved "impermissible collateral attacks" on the FPC order and its affirmance by the court of appeals (357 U. S. at 341).

In the course of his opinion for the Court, Mr. Justice Whittaker said (p. 336):

> "* * * It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. * * * So acting, Congress in § 313(b) [of the Federal Power Act] prescribed the specific, complete and exclusive mode for judicial review of the Commission's order. * * * It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which 'shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part' * * *. It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final,' subject to review by this Court upon certiorari or certifications. Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

The **Tacoma** case stands squarely for the proposition that when an administrative agency has issued an order, no

court other than the one with the statutory appellate jurisdiction may review the order in a suit to prevent the action which the administrative agency has authorized.

The **Tacoma** case represents no new or novel rule of law. Classic applications of its controlling principle are found in **Lambert Run Coal Co. v. Baltimore & Ohio R. R.**, 258 U. S. 377 (1922), and **Venner v. Michigan Central R. R.**, 271 U. S. 127 (1926).

In the **Lambert** case, a coal company brought an action in a state court to enjoin a railroad from distributing coal cars in accordance with certain rules which had been adopted pursuant to a regulation of the Interstate Commerce Commission. The case was removed to a federal court, and that court granted a preliminary injunction. On appeal, the Court of Appeals for the Fourth Circuit reversed on the grounds that (1) the Commission's regulations, and the railroad's rules issued pursuant thereto, were valid, and (2) "since the relief sought was to enjoin an order of the Commission, it could be granted only by a court of three judges" (258 U. S. at 381), *i.e.*, the tribunal empowered by statute to review ICC action.

This Court affirmed the Court of Appeals solely on the second ground. Mr. Justice Brandeis said for a unanimous Court (258 U. S. at 381-382):

> "* * * **the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and * * * the direction should have been to dismiss the bill for want of jurisdiction and without prejudice.** The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges."

Five years later, this Court reaffirmed the **Lambert** holding in connection with an administrative order which was merely permissive rather than mandatory. In **Venner v. Michigan Central R. R.**, *supra*, a minority shareholder sought to enjoin a railroad from issuing securities which had been authorized by the ICC. Plaintiff contended that issuance of the securities would be illegal because state agency approval had not been obtained as required by state law.

In holding that neither the state court in which the action had been brought nor the federal court to which it was removed had jurisdiction over the suit, Mr. Justice Van Devanter, speaking for a unanimous Court, said (271 U. S. at 130-131):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does **not expressly** pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be **enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.** *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377 * * *. That the order is not mandatory but permissive makes no difference in this regard. * * *"

See also, *e.g.*, **Texas v. Interstate Commerce Comm'n**, 258 U. S. 158, 164 (1922); **North Dakota v. Chicago & N. W. Ry.**, 257 U. S. 485 (1922); **Illinois Central R. R. v. Public Utilities Comm'n**, 245 U. S. 493 (1918).

The principle of the foregoing cases recognizes the proper place of administrative agency determinations in the overall legal pattern of governmental regulation. If such determinations are to be accorded the recognition to which they are entitled under applicable legislative mandates, collateral attack may not be permitted even when the attack is, as here, attempted under the guise of a proceeding which

is not, in name, directed against the administrative determination. The collateral attack is and must be forbidden whenever its practical effect, as in the instant case, is to invalidate action authorized by the administrative determination. That is precisely the effect sought by appellant here.

B. This Suit Was Properly Dismissed Under the Doctrine of Primary Jurisdiction.

Many decisions of this Court have recognized the primacy of an administrative agency's jurisdiction over that of courts in determining issues of public interest and reasonableness. Illustrative cases are **Smith v. Hoboken R. Co.**, 328 U. S. 123 (1946), and **Thompson v. Texas Mexican R. Co.**, 328 U. S. 134 (1946).

In the **Hoboken** case, the Court held that the district court had committed error when, in a reorganization proceeding, it decreed forfeiture of a railroad's lease without prior determination by the Interstate Commerce Commission. Mr. Justice Douglas, for a unanimous Court, emphasized that (328 U. S. at 131-132)—

> "* * * The Commission in preparation of the plan is guided not only by the requirements that the plan be fair and equitable and feasible. It is also charged with the duty of preparing a plan that 'will be compatible with the public interest.' * * * The point is that if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it interferes with the functions entrusted to the Commission under § 77. * * *"

In the **Texas Mexican** case, the Court similarly held that a state court had committed error in holding that a trackage agreement of a railroad then in the course of a reorganization proceeding had been terminated under its terms. The Court held that the Interstate Commerce Commission had exclusive jurisdiction to determine whether, and the conditions under which, a railroad operation might

be abandoned. As to the respective functions of the Commission and the courts, Mr. Justice Douglas, for a unanimous Court, said (at pp. 147, 150-151):

> "* * * [The Interstate Commerce Act] vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. * * * in a long line of cases beginning with *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. * * * If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. * * *"
>
> * * *
>
> "* * * If the Commission granted trackage rights, Tex-Mex could then recover judgment * * * for the amount of the rental fixed by the Commission. * * * The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix. In that case, too, **the court would have an administrative finding as a guide to the judgment it would enter.** In case abandonment were authorized without more, **respondent would then be free to move in this proceeding for judgment** and to apply to the bankruptcy court for compliance with the Commission's order. * * *"

The Court appended the following most significant footnote: (p. 151, n. 11):

> "If the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. * * *"

Similarly, since the FCC found that the station exchange involved in the instant case would serve the public interest, the district court had "an administrative finding as a guide to the judgment it should enter" and defendants were "free to move in this proceeding for judgment".

In the cases cited, as in its numerous other "primary" or "exclusive" jurisdiction decisions, this Court has—

> "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. * * *" **Far East Conference v. United States**, 342 U. S. 570, 574 (1952).

It should be noted, in answer to appellant's effort (pp. 21-22 n. 7) to distinguish **Far East**, that in that case the Court did not in any way rely on the exemption provision of the Shipping Act, but based its decision solely on the doctrine of primary jurisdiction. Indeed, the Court found it "significant" that the doctrine of primary jurisdiction "was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction" (342 U. S. at 575).

The Court was referring to **Texas & Pacific R. Co. v. Abilene Cotton Oil Co.**, 204 U. S. 426 (1907), which involved administrative action under a regulatory statute which expressly provided that "persons claiming to be damaged by any common carrier * * * may either make complaint to the Commission * * * or may bring suit * * * in any District or Circuit Court." The Court carefully considered the

further provision of the statute that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Appellant's reliance (p. 28, n. 10) on an identical provision in Section 414 of the Communications Act and on a passing dictum by a district court [11] concerning a similar provision in Section 1106 of the Civil Aeronautics Act (49 U. S. C. § 676) is thus clearly misplaced. This Court's unequivocal reaffirmance of **Abilene** in the **Far East** opinion is conclusive against appellant's argument.

More recently, in **Federal Maritime Board v. Isbrandtsen Co.**, 356 U. S. 481 (1958), this Court plainly foreclosed any contention (such as appellant makes at p. 21, n. 7) that its **Far East** decision was based on the Maritime Board's authority to approve certain agreements and thus exempt them from the application of the antitrust laws. The **Isbrandtsen** case was an appeal from the Maritime Board's approval of a dual rate agreement similar to the agreements which were found to be within the Board's primary jurisdiction and not subject to antitrust attack in **Far East** and in **United States Navigation Co. v. Cunard S. S. Co.**, 284 U. S. 474 (1932). In **Isbrandtsen**, this Court held that the Board had no authority to approve such dual rate agreements, because as a matter of law they violated the express terms of the Shipping Act. (Consequently, since only approved agreements are exempted from the antitrust laws under the Shipping Act, such agreements were not eligible for such immunity.)

Nevertheless, in **Isbrandtsen**, this Court emphasized that the **Cunard** and **Far East** decisions are not inconsistent with the Maritime Board's lack of authority to approve

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11. It should be noted that the original opinion in **Slick Airways v. American Airlines**, 107 F. Supp. 199 (D. N. J. 1952), *app. dismissed*, 204 F. 2d 230 (3d Cir. 1953), *cert. denied*, 346 U. S. 806 (1953), was rendered prior to this Court's decision in **Far East**. The opinion on rehearing, handed down after **Far East**, does not refer to that decision.

and exempt the agreements sought to be attacked under the antitrust laws in the earlier cases. As Mr. Justice Brennan stated for the Court (356 U. S. at 498):

> "It is, therefore, very clear that these cases [**Cunard** and **Far East**], while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack."

In short, throughout the half century from **Abilene** to **Interstate**, it has been clear that agency power to exempt conduct from judicial scrutiny is not a necessary prerequisite to the application of the doctrine of primary jurisdiction. Indeed, the doctrine of primary jurisdiction rests on the sound principle that, where Congress has entrusted the regulation of matters requiring "specialized competence" to an administrative agency, resort must be had to that agency, even though a court may thereafter correct agency errors on appeal.

Georgia v. Pennsylvania R. R., 324 U. S. 439 (1945), referred to by appellant (pp. 26, 34), is not inconsistent with these cases. In that case, the State of Georgia sought to enjoin, and to recover treble damages for, an alleged antitrust conspiracy pursuant to which a group of railroads had agreed on allegedly discriminatory rates.

This Court first held, on the authority of **Keogh v. Chicago & N. W. Ry.**, 260 U. S. 156 (1922), that no action for damages would lie because primary jurisdiction of actions for damages caused by allegedly illegal rates was in the Interstate Commerce Commission. In a five to four decision, the Court then ruled that the injunction phase of the action could be maintained because plaintiff did not seek to set aside rates which had been approved by the Commission. Mr. Justice Douglas was careful expressly

o limit the holding to situations in which administrative ction would not be disturbed by judicial action in the ntitrust suit.[12]

In the instant case, the district court could not grant ny of the relief sought by appellant without necessarily ritiating action taken and determinations made by the FCC. As to the Philadelphia-Cleveland station exchange transaction, appellant asks that NBC be divested of the Philadelphia stations, despite the fact the FCC has found that NBC's acquisition of those stations would serve the public interest, convenience and necessity and on this finding has expressly authorized the acquisition. Had the FCC concluded from the evidence before it what appellant now asks that the district court be permitted to conclude from precisely the same evidence, the FCC would have denied the application and the exchange agreement could not have been consummated. The FCC denial would thus have had the same effect as an injunction against consummation of the agreement, which is precisely the relief which would be granted in an antitrust suit if one could be maintained.

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12. One writer has referred to the **Georgia** case as "the only antitrust case which represents a retreat from the doctrine of primary jurisdiction as announced in the earlier decisions." He has further suggested that since the passage of the Reed-Bulwinkle Act [62 Stat. 472 (1948), 49 U. S. C. § 5b (1952)], authorizing the filing of rate agreements with the ICC, "perhaps in cases similar to the *Georgia* case arising today the Supreme Court would hold that the doctrine of primary jurisdiction is inapplicable unless the agreement has been submitted to the ICC; perhaps changes in the membership of the Court would lead to the adoption of the position taken by the *Georgia* dissenters." Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 938-939 (1954).

Another writer has said that in the **Georgia** case the applicability of the primary jurisdiction doctrine to antitrust actions "suffered a check, though it would seem only a momentary one." Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 U. of Pa. L. Rev. 577, 594 (1954).

In a final effort to salvage some sort of antitrust case, appellant states that the station exchange accomplished "only half of the object of the conspiracy" (p. 9) and that there was a "continuing conspiracy charged in the complaint" (p. 34 n. 13).

A short answer to this argument is found in the Stipulation. For the so-called "continuing conspiracy" (p. 36) is, as appellant is compelled to concede, "charged in the complaint" (p. 34, n. 13). And the Stipulation expressly states:

> "The FCC had before it all of the evidence relating to **all of the antitrust issues presented by the complaint in this action.**" (S. 7 at R. 139)

The FCC had a duty to and did consider whether this evidence showed any violation of the antitrust laws (S. 8 at R. 139), in the course of deciding all the issues relating to the exchange which it could lawfully decide (S. 9 at R. 139). Hence, the FCC had before it all of the evidence pertaining to any alleged "continuing conspiracy" and considered such evidence before it authorized the license transfer. By authorizing the transfer, the FCC has necessarily determined that no such "continuing conspiracy", of which the station exchange was allegedly the overt act, in fact existed.

The only purpose of the alleged "continuing conspiracy" stated by appellant is "to obtain VHF television station ownership for NBC in five of the eight primary markets" (Complaint, ¶ 19 at R. 6). However, just as was true with the Philadelphia-Cleveland exchange, NBC cannot possibly ever acquire any station without FCC approval.

In any future proceeding on an application for such approval, the FCC will be required to determine whether the proposed station acquisition constitutes an antitrust violation. Again, as appellant has stipulated was true in connection with the Philadelphia acquisition (S. 12), ap-

ellant will have available a complete administrative remdy and full right to judicial review. And, of course, f FCC approval is denied, the acquisition will not be conummated—precisely the result which appellant argues it lesires to have a judicial injunction achieve. It is difficult o imagine a more flagrant disregard of orderly administraive process than would result from an equity decree such as appellant seeks, which would remove from the FCC ts statutory duty of passing on license applications by NBC or any other broadcaster and would vest that pecuiarly administrative function in a district court.

C. The Doctrine of Primary Jurisdiction Applies When the Collateral Judicial Proceeding Follows the Administrative Proceeding and Gains Added Vitality From the General Principles Underlying Such Doctrines as Administrative Finality, Collateral Estoppel and Res Judicata.

Like **Far East**, the majority of the cases involving the doctrine variously denominated as "primary jurisdiction", "exclusive jurisdiction" or "prior resort" arise in factual situations in which resort to a court is attempted before the administrative agency has acted. However, as Mr. Justice Harlan has recently stated in **United States v. Western Pacific R. R.**, 352 U. S. 59, 63 (1956), the doctrine does not merely prescribe a "procedural timetable" for litigation, but it—

> "* * * is concerned with promoting of proper relationships between the courts and administrative agencies charged with particular regulatory duties. * * * [It] applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a

case the judicial process is suspended pending referral of such issues to the administrative body for its views * * *.

* * *

"The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects 'of commercial relations. * * *'"

The **Tacoma** case, like the earlier **Lambert** and **Venner** line of cases (discussed at pp. 24-27 *supra*), applied the basic doctrine to a situation in which the administrative agency had acted within the scope of its jurisdiction before the jurisdiction of a court was invoked. Not only is the principle of primary jurisdiction equally applicable in this time sequence; in such cases the principle acquires added support in the rule prohibiting collateral attacks on administrative action and the related principles of such doctrines as res judicata and collateral estoppel.

In **Sunshine Anthracite Coal Co. v. Adkins**, 310 U. S. 381 (1940), this Court held that a decision by the National Bituminous Coal Commission, upheld by the Court of Appeals in a statutory review proceeding, that the appellant's product was bituminous coal within the coverage of the Bituminous Coal Act of 1937, was res judicata in an action brought by appellant against the Commissioner of Internal Revenue to enjoin collection of a tax imposed by that statute on sales of bituminous coal.

United States v. Willard Tablet Co., 141 F. 2d 141, 142-143 (7th Cir. 1944), held that a decision of the Federal Trade Commission exonerating a seller of a charge of misrepresentation was res judicata in a suit subsequently instituted by a United States Attorney to condemn the commodity because of alleged false labeling under the

Food, Drug and Cosmetic Act. See also, **Lentin v. Comm'r of Internal Revenue**, 226 F. 2d 695 (7th Cir. 1955), holding that a federal district court finding in an action instituted by the Price Administrator, that defendant had willfully violated the Emergency Control Act of 1942, was res judicata in a subsequent action instituted by the defendant in the Tax Court to review a ruling of the Commissioner of Internal Revenue that payment of the district court judgment was not an ordinary and necessary expense for income tax purposes.

These decisions completely dispose of appellant's superficial attempt (pp. 20-21) to avoid the applicability of the time-honored rules of res judicata and collateral estoppel.[13] As Mr. Justice Whittaker said in the **Tacoma** case, which involved a situation substantially indistinguishable from the present, the principle of administrative finality "need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts" (357 U. S. at 336).

The authorities which we have reviewed, as well as many others, all achieve a common goal—the preservation of the role of administrative agencies in our scheme of government—by protecting their actions against collateral attack and by refusing to permit preemption of their functions. As the court below so pointedly stated, after discussing **Far East** (R. 196):

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13. Appellant's passing statement (p. 21) that the FCC's "finding, if any, was one of law and not of fact" is surprising. There is, perhaps, no question anywhere in the law which is more factual than whether a person has engaged in an agreement, contract, conspiracy or combination in unreasonable restraint of trade or whether certain conduct will serve the public interest, convenience and necessity.

In any event, it appears to be established that even questions of "law" are embraced within the principles of primary jurisdiction and exhaustion of administrative remedies. **Aircraft & Diesel Corp. v. Hirsch**, 331 U. S. 752 (1947).

"* * * The same result has been reached in a number of other cases in which the reasons advanced by the courts were variously want of jurisdiction * * *, the doctrines of primary jurisdiction * * *, administrative finality or its equivalent, the exhaustion of administrative remedies * * *, all, however, involving the basic policy of supporting the rulings of administrative agencies against court review otherwise than as provided in the statutes creating the agencies, and of protecting the parties involved against 'this type of double jeopardy * * * for the same allegations before two different tribunals.' (Conference Report on Amendments to the Communications Act). * * *"

III.

THE COURT PROPERLY DISMISSED THE COMPLAINT IN THE EXERCISE OF ITS EQUITABLE DISCRETION.

The court below properly held that the pleadings and the stipulation require dismissal of the action on long-settled principles of equity (R. 198-199).

It is well established that the Government is not entitled to equitable relief automatically upon showing that a defendant has committed a violation of law.

In **Hecht Co. v. Bowles**, 321 U. S. 321 (1944), the Price Administrator proved that defendant had violated the Emergency Price Control Act and demanded an injunction pursuant to Section 205(a) of the Act, 56 Stat. 33 (1942), which provided that "injunctive relief **shall** be granted" upon a showing of violation. This Court held that the issuance of an injunction under Section 205(a) was within the discretion of the district court and that such discretion was to be exercised in accordance with traditional equity concepts. Mr. Justice Douglas said for the Court (p. 329):

"* * * A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under

any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

"* * * We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' * * *"

Obviously, the facts of each case will control the application of equitable principles, and the controlling facts in **Hecht Co. v. Bowles** referred to by appellant (p. 39) were different from those present here. But that does not alter the basic proposition that equitable principles apply.

Indeed, they apply with even greater force to actions under Section 4 of the Sherman Act, which, by its language, does not purport to provide that injunctive relief **shall** be granted on petition of the Government.

This Court has previously declared that antitrust injunction actions by the Government are governed by traditional principles of equity. For example, in **Appalachian Coals, Inc. v. United States,** 288 U. S. 344, 377 (1933), in reversing the grant of an injunction by the district court, Mr. Chief Justice Hughes said for a unanimous Court:

"* * * As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint * * *.

"The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. * * *"

The stipulation (S. 2 at R. 137) states that WBC and NBC filed applications for approval of the exchange on June 15, 1955. The FCC formally notified the Justice Department of these applications, and the involvement of possible antitrust questions, on August 12, 1955 (S. 4 at R. 138). On October 17, 1955, the FCC issued Section 309(b) letters which listed, inter alia, antitrust issues which the Commission believed were involved (S. 5 at R. 138). On November 16, 1955, WBC and NBC filed answers to these letters (S. 5 at R. 138). The FCC kept the Department of Justice fully informed as to the evidence in its possession and as to the status of the applications (S. 11 at R. 139).

The FCC granted the exchange applications on December 21, 1955 (S. 10 at R. 139). On January 22, 1956, the statutory appeal period having expired, the exchange was effected in reliance on the FCC authorization (S. 13 at R. 140). The present complaint, based on precisely the same evidence as was before the FCC when it acted on December 21, 1955, was not filed until nearly a year later, on December 4, 1956.

Thus, the admitted facts are that six months elapsed between the filing of the applications and their approval, and seven months between the filing of the application and the consummation of the transaction. The FCC did not approve the transaction until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted to possible antitrust features. And then the transaction itself was not consummated for another month.

Yet at no time did the Department of Justice exercise any of its rights to participate in the FCC proceeding (S. 12 at R. 139).

Had the Department taken proper steps, its contentions could have been determined in an orderly manner. Instead, in reliance on the FCC's approval, which the Department left unchallenged, the parties consummated a transaction involving millions of dollars and made vast changes in their

positions involving not only the parties themselves but obviously personnel as well. And the Department would now—having started nearly a year later—subject appellees to costly litigation to defend a transaction which was consummated openly, in good faith reliance on final approval by the qualified regulatory agency, after the statutory period for appeal had elapsed.

Tacitly accepting the principle that traditional concepts of equity are fully applicable in government antitrust cases generally, appellant seems to direct the main thrust of its argument for reversal on this point to the proposition that these concepts are not applicable **in this case** because there was no reasonable reliance on the FCC's approval and because the Government's only real delay was for 32 days between FCC's approval and the consummation of the transaction.

These arguments ignore the fact that appellant has specifically **stipulated** that the exchange was consummated in **reliance** on the FCC determination (after consideration of the antitrust issues) that the exchange was in the public interest (S. 8, 13 at R. 139-140). They also ignore the fact that what Chief Judge Kirkpatrick ruled was (R. 199):

> "In the present case the parties presented the Commission with full information, received permission for the transfer in a proceeding which covered six months, and consummated the transaction a month thereafter. It may be noted that the Commission's approval was not granted until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features. * * *"

This can hardly be construed as "criticizing" the Government solely for its inaction during the 32 days following the FCC approval, although it might be noted in passing that Congress has determined that 30 days is the appropriate maximum time for seeking court of appeals

review. Nor can we lose sight of the fact that appellant has stipulated that, at least as early as the time of the FCC approval over a year before appellant filed its complaint in this case, appellant was in possession of all of the evidence that it now has relative to the alleged antitrust violations (S. 7, 11 at R. 139).

In light of these facts, appellant's suggestion that the admitted reliance on the FCC approval was "unreasonable" amounts to a contention that a citizen can never safely act pursuant to a valid administrative order for fear that his action may later be attacked by the Department of Justice. If it is not "reasonable" to act in reliance on official approval granted by the agency which Congress has designated to grant or withhold such approval, then language has lost its meaning. Would "reasonableness" require that the parties postpone consummation of the transaction[14] to permit the Department of Justice to complete its investigation of matters concerning which it already had full information? Under appellant's view, the **only** way the parties could have acted "reasonably" was not to have acted at all—a result hardly in furtherance of the public interest in broadcasting.

The Court of Appeals for the District of Columbia has "often said that valuable rights and investments made in reliance on a license of the Federal Communications Commission should not be destroyed except for the most compelling reasons". **Churchill Tabernacle v. Federal Communications Comm'n**, 160 F. 2d 244, 247 (D. C. Cir. 1947). Clearly there are no "compelling reasons" in the present case, since here appellant had full opportunity to forestall NBC's station acquisition, if, as appellant now contends, the acquisition was not in the public interest.

14. Appellant itself has implied (pp. 38-39) that it could have instituted suit as late as 35 years after NBC's acquisition of the Philadelphia stations.

Appellant's further statement (p. 37) that "appellees have not shown that they believed in good faith that the Government had decided not to challenge or were otherwise not aware that they were proceeding with the exchange at their own risk", would not warrant any comment were it not for appellant's use of it as an occasion for a distortion of facts in an attempt to convict appellees of an inconsistency. Specifically, appellant asserts that in **WBUF-TV, Inc.**, FCC Docket No. 11528, NBC said that "Congress has made it clear * * * that it did not believe this Commission was the proper forum for the prosecution and adjudication of antitrust litigation * * *."

This contention by NBC was overruled by the FCC in **WBUF-TV**, 13 Pike & Fischer Radio Reg. 60b (FCC 1957). The contention is not inconsistent with appellees' position here in any event. Taken in context, it is clear that the "antitrust litigation" referred to by NBC in the above quoted statement did **not** involve broadcasting but involved certain patent licensing practices of RCA. Thus, NBC's statement did not relate to antitrust issues, such as those presented by the present complaint, arising out of a transaction requiring FCC approval.

In the **WBUF-TV** proceeding, the protestant sought also to have the FCC "determine whether the circumstances surrounding the [Philadelphia-Cleveland exchange] adversely reflect on NBC's character qualifications to own and operate broadcast stations in the public interest." Significantly, NBC did **not** contend that the FCC was not a proper forum for determination of **that** issue. On the contrary, NBC argued that "the very question has been decided" by the FCC approval which is involved in the present case. As NBC pointed out in its motion to dismiss the protest, it would be—

> "* * * incongruous and violative of sound administrative process for the Commission, after having decided the issue in the proceeding in which it was

directly involved and on a full record, to permit [the protestant] to relitigate it here."

NBC has consistently maintained, as the court below has held, that the FCC is the proper, and the **only**, forum in which to determine whether a specific transaction requiring its affirmative approval is violative of the antitrust laws. Equally consistently, NBC has always maintained that the courts, not the FCC, furnish the proper forum in which to determine whether transactions not requiring FCC approval are in violation of the antitrust laws.

Appellant's position is that appellees, private companies which have followed all the statutorily prescribed procedures, which have fully supplied all information requested of them, and which have always been subject to the extensive investigatory powers of various government agencies, should bear the entire burden of appellant's failure to take any step to protect what it now claims is its legitimate interest. This view hardly conforms to the basic maxim that he who seeks equity must do equity.

As the Government has frequently had to be reminded by the courts, the Government is not beyond the requirements of fair play in its dealings with private individuals. Like private litigants, it cannot seek the aid of an equity court when it has been guilty of grossly inequitable conduct to the detriment of the defendant. As Mr. Justice Holmes stated in **United States v. The Thekla**, 266 U. S. 328, 339-340 (1924):

> "* * * When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. * * *".

CONCLUSION.

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

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November 12, 1958.

APPENDIX A.

COMMUNICATIONS ACT OF 1934.

§ 309. Application for license—(a) Examination; action by Commission.

If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Notification of denial; contents; reply; hearing intervention.

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention show-

ing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) Protest; time; findings; redraft of issues; burden of proof; postponement of grant.

When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision

that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

§ 402. Judicial review of Commission's orders and decisions—

* * *

(b) Right to appeal.

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * *

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

§ 405. Rehearing before Commission; application; procedure; time of filing; additional evidence.

After a decision, order, or requirement has been made by the Commission in any proceeding, and party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. * * * The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. * * *

APPENDIX B.

Stipulation.

The parties hereby stipulate to the following statement for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein, and for no other purpose, and stipulate that nothing contained in this stipulation shall be used as a basis for objection to the introduction of evidence at any trial of this action:

1. On May 16, 1955, National Broadcasting Company, Inc. ("NBC") entered into a written agreement with Westinghouse Broadcasting Company, Inc. ("WBC") under which, subject to the approval of the Federal Communications Commission ("FCC"), WBC would acquire the television and radio broadcasting facilities owned and operated by NBC in Cleveland, Ohio, NBC would acquire the television and radio broadcasting facilities owned and operated by WBC in Philadelphia, Pennsylvania, and NBC would pay WBC $3,000,000. This is the agreement referred to in paragraph 21 of plaintiff's complaint. A copy of the agreement is attached to this stipulation as Exhibit A.

2. Before the agreement referred to in the preceding paragraph could be consummated, WBC and NBC were required by the Communications Act of 1934 (the "Act") to obtain approval of the proposed exchange from the FCC. Applications for such approval had to be filed with the FCC in a prescribed form setting forth detailed information, including the terms of the transaction and each party's reasons for requesting the transfer. Both parties filed such applications for FCC approval of the exchange on June 15, 1955.

3. Upon the filing of the applications, the FCC instituted a proceeding (hereinafter referred to as the "exchange proceeding"). During the course of the exchange proceeding the FCC conducted an extensive investigation of the proposed exchange and of the negotiations leading to it, including interviews with all WBC and NBC officials involved in the transaction, and others, and a detailed examination of the files, records and other relevant material, and complete reports of the investigation were prepared.

4. On August 12, 1955, the FCC notified the Department of Justice, Antitrust Division, that the WBC and NBC applications for approval of the exchange were pending before the FCC and that possible antitrust questions were raised by these applications.

5. On October 17, 1955, the FCC issued letters, pursuant to Section 309(b) of the Act, to WBC and NBC stating the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the parties were requested to furnish additional information. Three of the seven members of the FCC, favoring immediate grant of the applications, voted against issuance of the letters. The majority, however, felt that the applications should not be approved without further information.

6. On November 16, 1955, WBC and NBC each filed answers to the FCC's 309(b) letters, furnishing detailed data. In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

7. In considering and acting on the exchange applications, the FCC had before it the detailed information contained in the applications, the results of its extensive investigation and analysis, and the information contained in

the lengthy and detailed answers by WBC and NBC to the 309(b) letters. The FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action.

8. In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws.

9. The FCC decided all issues relating to the exchange which it could lawfully decide.

10. On December 21, 1955, the FCC granted the exchange applications. Its action was a valid exercise of its jurisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies. A copy of the public notice of the FCC action, issued December 28, 1955, including the separate statement of Commissioner Doerfer and the dissenting statement of Commissioner Bartley, is attached to this stipulation as Exhibit B.

11. Following the original notification to the Department of Justice on August 12, 1955 of the pendency of the exchange applications, the FCC and the Department of Justice conferred and exchanged information relating to the exchange, and the FCC kept the Department of Justice fully informed as to the evidence in the FCC's possession relating to the exchange and the status of the applications.

12. In the exchange proceeding, the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At

no time did the Department of Justice exercise any of these rights.

13. On January 22, 1956, acting in reliance on the FCC's determination, WBC and NBC effected the exchange as approved and authorized by the FCC.

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APPROVED this 1st day
of August 1957.

/s/ Kirkpatrick, *Ch. J.*

[Exhibits omitted.]